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In the Supreme Court of the United States

OCTOBER TERM, 1974

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL., PETITIONERS

v.

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute and regulations involved	3
Statement	3
Reasons for granting the writ	11
Conclusion	23
Appendix A	1a
Appendix B	29a
Appendix C	44a
Appendix D	81a
Appendix E	83a
Appendix F	117a

CITATIONS

Cases:

Appalachian Mountain Club v. *Brinegar*, D.N.H., Civ. No. 74-208, decided March 25, 1975	13
Calvert Cliffs' Coordinating Committee v. *Atomic Energy Commission*, 449 F.2d 1109	15

Cases—Continued

	Page
Citizens Environmental Council v. *Volpe*, 484 F.2d 870	14
Daly v. *Volpe*, C.A. 9, No. 74-2566, decided March 20, 1975	18
Environmental Defense Fund v. *Corps of Engineers*, 470 F.2d 289, certiorari denied, 412 U.S. 931	15
Finish Allatoona's Interstate Right, Inc. v. *Brinegar*, 484 F.2d 638, affirming 355 F. Supp. 933	14
Greene County Planning Board v. *Federal Power Commission*, 455 F.2d 412, certiorari denied, 409 U.S. 849	9
Indian Lookout Alliance v. *Volpe*, 484 F. 2d 11	18, 19
Iowa Citizens for Environmental Quality, Inc. v. *Volpe*, 487 F.2d 849	14
James River and Kanawha Canal Parks, Inc. v. *Richmond Metropolitan Authority*, 481 F.2d 1280, affirming 359 F. Supp. 611	18
Life of the Land v. *Brinegar*, 485 F.2d 460	14
Movement Against Destruction v. *Volpe*, 500 F.2d 29, affirming 361 F. Supp. 1360	14, 18
Named Individual Members of the San Antonio Conservation Society v. *Texas Highway Department*, 446 F.2d 1013	19
Scientists' Institute for Public Information, Inc. v. *Atomic Energy Commission*, 481 F.2d 1079	22
Sierra Club v. *Callaway (Trinity River)*, 499 F.2d 982	18

Cases—Continued

	Page
Sierra Club v. *Lynn*, 502 F.2d 43	13-14
Sierra Club v. *Stamm*, 507 F.2d 788	18
Steubing v. *Brinegar*, 511 F.2d 489	10
Swain v. *Brinegar*, C.A. 7, No. 74-1625, decided April 29, 1975	13
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205	16
Trout Unlimited v. *Morton*, 509 F.2d 1276	18, 22

Statutes, regulations and rules:

Department of Transportation Act of 1966, Section 4(f), 49 U.S.C. 1653(f)	7
Intergovernmental Cooperation Act of 1968, 42 U.S.C. 4231(b)	10
National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332 *et seq.*:	3
Section 102	14, 117a
Section 102(2)(A)	20
Section 102(2)(B)	20
Section 102(2)(C)	2, 117a
Section 102(2)(D)	20, 118a
40 C.F.R. 1500.7(c)	15, 118a

Miscellaneous:

Fifth Annual Report of the Council on Environmental Quality (1974)	11, 15
H.R. 3130, 94th Cong., 1st Sess. (1975)	12
H.R. 3787, 94th Cong., 1st Sess. (1975)	12
H.R. Rep. No. 94-111, 94th Cong., 1st Sess. (Parts 1 and 2) (1975)	12

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The Solicitor General, on behalf of the Secretary of Transportation and David B. Kelley, Division Engineer of the Federal Highway Administration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.[1]

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[1] Respondents are: The Conservation Society of Southern Vermont, Inc.; Bernard G. Winslow, Leon R. Eldred, Antiss H. Eldred, and Wallace E. Van Keuren, individually and as members of the Conservation Society; Lawrence Wasco and Ruth Wasco, individually; H. James Wallace, Frank A. Balch, Henry O. Angell, Robert S. Bigelow and H. Gordon Smith, as

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-28a) is reported at 508 F.2d 927. The opinions of the district court are reported at 343 F. Supp. 761 (App. B, *infra*, pp. 29a-43a) and 362 F. Supp. 627 (App. C, *infra*, pp. 44a-80a).

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, pp. 81a-82a) was entered on December 11, 1974. By order of March 4, 1975, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 102(2)(C) of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332(2)(C), provides that all agencies of the federal government shall include in every recommendation or report on "major Federal actions significantly affecting the quality of the human environment" a detailed statement "by the responsible official" on the environmental impact of the proposed action. The questions presented are:

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members of the Vermont State Highway Board; and John T. Gray, Vermont's Commissioner of Highways. The state respondents supported the federal parties below.

1. Whether the statement can be prepared by state officials under the supervision of the responsible federal official, if the responsible official adopts and publishes a substantively adequate statement as his own.

2. Whether the statement to be issued must include consideration of highway segments not yet planned by any state official and not yet proposed to or approved by any federal official.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the National Environmental Policy Act of 1969, the Guidelines of the Council of Environmental Quality, and the implementing policy statements and regulations of the Federal Highway Administration are set out in Appendix F, *infra*, pp. 117a-146a.

STATEMENT

United States Route 7 ("Route 7") is the major north-south highway in the State of Vermont. As the population of Vermont has grown and the highway has become older, improvements have become necessary. The district court found that the "design of Route 1 is obsolete for much of its length, * * * being winding, narrow, hilly, with short sighting distances, relatively sharp curves, limited to two lanes, and presenting hazards to the traveling public as well as the local populace" (App. B, *infra*, p. 31a). Approximately "90 per cent of the present highway is in the bad to poor safety category" (App. C, *infra*, p. 62a).

Improvement of Route 7 has been discussed and planned for more than 17 years. When the National Environmental Policy Act of 1969 ("NEPA") became effective on January 1, 1970, the design of many improvements had been substantially completed. One of the proposed improvements is at issue in this case. It calls for a new two lane highway (the "segment") to be built between Bennington and Manchester, Vermont, a distance of about 20 miles. The segment will be financed in part by federal money, and therefore must be approved by the Federal Highway Administration (the "Administration"), an agency within the Department of Transportation.

1. Because the segment had been planned and designed prior to the passage of NEPA, local and federal officials continued their preparations without preparing an environmental impact statement. On May 4, 1972, some of the respondents brought an action seeking an injunction against additional preparation or construction until an impact statement had been prepared. The district court concluded that, "at least where * * * the project has not become so final in engineering detail as to be ready to submit to bid" on the effective date of NEPA, an impact statement would be required before a project could continue (App. B, *infra*, p. 41a). Accordingly, on October 26, 1972, the district court enjoined further action pending preparation of an impact statement.

2. The Administration has established procedures for fulfilling the requirements of NEPA. It initially

set out this procedure in Policy and Procedure Memorandum (PPM) 90-1 (see App. F, *infra*, pp. 119a-127a), which requires the highway authority of the state seeking federal financing to prepare a draft environmental impact statement.[2] This draft is prepared in consultation with federal officials, and must incorporate all of the relevant environmental considerations. Once the draft is completed, it is circulated for comment. The Administration reviews the draft impact statement at both the local and regional level and makes suggestions for improvement; if the statement is unsatisfactory, the Administration will reject it and order the preparation of another.

The state highway authority then must revise the draft impact statement and prepare a final impact statement. This document, too, receives scrutiny by the Administration, this time at the local, regional and national levels. If the statement adequately considers and evaluates the environmental issues, the Administration approves it and adopts it as its own impact statement. After the Administration has approved the impact statement, it is forwarded to the Assistant Secretary of Transportation for Environment, Safety and Consumer Affairs, who also must approve it. It then becomes, and is treated for all purposes as, a federal document.

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[2] PPM 90-1 has been superceded by regulations effective December 2, 1974 (see App. F, *infra*, pp. 128a-146a). These new regulations, although more detailed than PPM 90-1, establish procedures functionally similar to those in PPM 90-1, and their application would present issues identical to those in this case.

After the district court's decision in October 1972, the prescribed procedure was followed in this case. An engineering coordinator of the local office of the Administration "maintained frequent contact" (App. C, *infra*, p. 47a) with the Vermont Highway Department during the preparation of the draft impact statement. On at least one occasion the Administration's division engineer went on a field trip with state officials and environmental consultants, and they discussed the environmental considerations involved in construction (*ibid.*).

The draft environmental impact statement prepared by the Vermont Highway Department was "submitted to the public for comment and to the division office of [the Administration] in Montpelier, Vermont, and the regional office in Delmar, New York" (*ibid.*). At the regional office the statement was examined and assessed by the director of the Office of Environment and Design and by a Regional Task Force, which included "bridge and construction engineers, a hydraulics engineer, a landscape architect, a 'regional relocation specialist,' a regional urban planner, and the Deputy Regional Federal Highway Administrator" (App. C, *infra*, pp. 47a-48a). After this consideration the local office of the Administration wrote to the Vermont Highway Department, making three specific suggestions for additional evaluations of environmental considerations (*id.* at 48a).

All three of the suggestions were accepted by the Vermont planners, and additional sections incorporating them were written for the final impact statement. When that final statement was issued, it was reviewed as provided in PPM 90-1 at the local, regional and national offices, was approved without additional change, and was issued as a federal document.

3. On March 20, 1973, the state and federal parties jointly moved to dissolve the previously-entered injunction. The court thoroughly scrutinized the final impact statement and concluded that, although there was room for some improvement, it represented a good faith assessment of all pertinent environmental considerations, and was adequate to meet the requirements of NEPA (*id.* at 54a-63a). Nevertheless, for two separate reasons, the court declined to allow the project to proceed.[3]

The court held that it was impermissible to allow state officials to prepare a draft impact statement. The court believed that an impact statement prepared by state officials "is bound to be 'self-serving' " (*id.* at 50a) and that the Administration had a "duty of preparation" that it could not "delegat[e]" to state officials (*id.* at 51a) because NEPA states that "the responsible official" shall issue the state-

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[3] The district court also concluded that federal officials had not adequately complied with Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 1653(f), which declares that the Secretary of Transportation shall not approve construction across publicly owned park or recreation lands unless there is "no feasible and prudent alternative." This holding was not appealed, and steps have been taken to comply with the court's decision.

ment. Under the district court's view, it was immaterial that the Administration reviewed the statement and ultimately adopted it as a federal document.

The district court's second reason for disapproving the impact statement was that the statement did not consider the potential environmental effects of building a limited access superhighway over the entire 280 mile "Route 7 corridor" in Connecticut, Massachusetts and Vermont (essentially stretching from New York to the Canadian border), but had instead confined its analysis to the 20 miles of two-lane highway actually proposed for construction. The court concluded that the segment between Bennington and Manchester was badly needed and had independent utility even if no other segment were built (App. C, *infra*, p. 68a); that there was no overall plan to build a highway in the Route 7 corridor (*id.* at 63a); that Massachusetts and Connecticut were not even considering additional superhighway construction (*ibid.*); and that "there is no overall federal plan for improvement of the Route 7 corridor" (*id.* at 64a). The court believed, however, that "the three states' highway departments are looking toward this end as possible of accomplishment" (*ibid.*); that construction of any segments would increase traffic and create pressure for the construction of additional segments (*ibid.*); and that it would be desirable for federal officials to take an overview of the effects of construction of a highway through the corridor. The court therefore held that "the filing of an overall [impact statement] by the [Administration] in re-

spect to the entire Route 7 corridor" was a precondition to construction of the segment between Manchester and Bennington (*id.* at 68a).

4. The court of appeals affirmed.[4] It agreed with the district court that state preparation of an impact statement is undesirable, and that it would presume that such preparation would be biased (App. A, *infra*, p. 9a). It also held that the responsible federal official had a nondelegable duty to *prepare* the impact statement as well as to issue it. Citing *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (C.A. 2), certiorari denied, 409 U.S. 849, the court held that "[n]othing short of 'genuine' federal preparation" of the impact statement would be acceptable (*id.* at 10a-11a). The federal preparation envisaged by the court apparently must be total since the court sought to render "unnecessary" (*id.* at 10a) any further litigation over the adequacy of federal participation in the impact statement by adopting an "unambiguous rule" (*ibid.*). In a case consolidated for disposition,[5] the court held that even "searching" review of a draft

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[4] No appeal was taken from the district court's conclusion that the impact statement adequately considered the environmental effects of building the segment. See App. A, *infra*, p. 3a, n. 6.

[5] The instant case was consolidated on appeal with *Vermont Natural Resources Council, Inc.* v. *Brinegar*, No. 74-2168. The district court there had allowed construction to go forward. The court of appeals held that NEPA had not been complied with, but affirmed the denial of equitable relief. We do not seek review of that decision.

impact statement to which "federal agency contributions * * * were found to be substantial" is inadequate (*id.* at 13a, n. 26). As another panel of the Second Circuit described the holding below, "the responsible federal agency has a 'primary and nondelegable responsibility' to make its own comprehensive and objective evaluation of the environmental impact of a project constituting a major federal action" (*Steubing* v. *Brinegar*, 511 F.2d 489, 496 (C.A. 2)).

The court of appeals also held that the impact statement must cover "transportation systems in the entire 280 mile Route 7 corridor" (App. A, *infra*, p. 15a). It accepted the district court's finding that "no plan presently exists" (*ibid.*) for constructing a superhighway in the area and that the segment between Manchester and Bennington has "local utility" (*id.* at 19a). Nevertheless, it concluded, because "an ultimate Route 7 superhighway is the expectation of state agencies with the knowledge and cooperation of the federal government" (*id.* at 16a), the environmental effects of such a potential system must be studied before any part of it can be built.[6]

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[6] The district court predicated its holding, in part, upon the Intergovernmental Cooperation Act of 1968, 42 U.S.C. 4231(b). The court of appeals did not consider this alternative ground in light of its NEPA conclusion. See App. A, *infra*, p. 20a, n. 44.

REASONS FOR GRANTING THE WRIT

This case presents related questions concerning the interpretation of NEPA, a major statute applicable to every federal agency and action having a significant effect upon the environment. Although the questions presented in this case deal with highway construction, their resolution may affect the procedures used by all federal agencies. Even within their narrowest confines the questions presented are of considerable importance: we have been informed by the Department of Transportation and the Council on Environmental Quality that approximately one third of all impact statements issued by all federal agencies concern highway construction. See Fifth Annual Report of the Council on Environmental Quality 389 (1974).

The responsible federal official must make two fundamental decisions before beginning every environmental investigation: who has the initial obligation to prepare the document, and what subjects the impact statement will cover. The decision of the court of appeals has introduced considerable uncertainty into this process. Because of the conflict among the circuits (which we discuss *infra*), federal officials must perform their duties in different ways in different parts of the country, a prospect that is particularly undesirable because not only NEPA but also the federal highway program were designed as national programs of uniform applicability. The conflict among the circuits—and the inevitable uncer-

tainty in predicting how other circuits will resolve similar questions—places federal administrators in the position of attempting to comply with NEPA only to be told, at a later date, that their understanding of the statute was incorrect and they must start again.

The "start again" command in this case is a literal one. The court of appeals has directed the Administration to make an independent environmental investigation of not only the Manchester-Bennington segment but also the entire "Route 7 corridor." This new assessment, which will be in addition to the previous and (the district court held) adequate assessment, will take substantial time to complete, circulate for comment, revise and recirculate. At least one construction season will be lost as a result; and the delay in construction will in turn increase ultimate cost. In the jurisdictions affected, thousands of jobs throughout many states will be lost at the height of the current recession.[7] This pattern of delay will repeat itself in any other circuit that adopts the position of the court below, and will become endemic because it will expand from one to two the number of

[7] Primarily because of these problems a number of bills were introduced in Congress to overturn the result below. H.R. 3130 provides that any impact statement issued by a state official under the supervision of a federal official shall not be considered inadequate on the ground that it was not prepared by a federal official. H.R. 3787 makes the same provision, but is limited to highway projects in the Second Circuit. See H.R. Rep. No. 94-111, 94th Cong., 1st Sess. (Parts 1 and 2) (1975). Both bills passed the House on April 21, 1975 and are under study in the Senate.

"rounds" of environmental consideration required before any project may be approved. Each round is both costly and lengthy. We submit that a single "round" of adequate environmental consideration, on a properly defined project, is all that NEPA requires. Because of the importance of the issue and the conflict among the circuits, we believe that both issues warrant consideration by this Court.

1. The Court of Appeals for the Second Circuit has held that federal officials must independently analyze the environmental issues in state highway construction and must write and issue an impact study of their own. The court stated that although the Administration need not ignore any previous efforts of the state authorities, it could not "delegate" to state authorities any part of the task of research and writing. The decision has been so understood, and followed, by two other courts: the Seventh Circuit (*Swain* v. *Brinegar*, C.A. 7, No. 74-1625, decided April 29, 1975, reproduced in App. E, *infra*, pp. 83a-116a, at pp. 103a-111a) and the District of New Hampshire (*Appalachian Mountain Club* v. *Brinegar*, D.N.H., Civ. No. 74-208, decided March 25, 1975). As the court below acknowledged (App. A, *infra*, p. 2a, n. 3), the courts of appeals for the Fourth, Fifth, Eighth, Ninth and Tenth Circuits have decided, to the contrary, that state agencies may prepare impact statements under federal supervision, if the statement is prepared with the guidance and participation of the federal agency and is analyzed, adopted and issued as a federal document. See *Sierra*

Club v. *Lynn*, 502 F.2d 43, 59 (C.A. 5); *Movement Against Destruction* v. *Volpe*, 500 F.2d 29 (C.A. 4), affirming 361 F. Supp. 1360, 1393 (D. Md.); *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe*, 487 F.2d 849 (C.A. 8) (expressly approving PPM 90-1); *Life of the Land* v. *Brinegar*, 485 F.2d 460 (C.A. 9); *Citizens Environmental Council* v. *Volpe*, 484 F.2d 870 (C.A. 10) (sustaining a procedure identical to that used in this case); *Finish Allatoona's Interstate Right, Inc.* v. *Brinegar*, 484 F.2d 638 (C.A. 5), affirming 355 F. Supp. 933 (N.D. Ga.).

We submit that the majority position, rather than the view of the Second and Seventh circuits, is supported by the language and purposes of NEPA. Section 102 of NEPA requires "all agencies" to "include in every recommendation" for major federal action "a detailed statement by the responsible official" concerning potential environmental effects of the proposal. Although it clearly is a federal task for the "responsible official" to see to it that such a "detailed statement" is prepared and included with the recommendation, NEPA does not require any specified individual or agency physically to prepare the statement. Issuance of an adequate statement is a federal responsibility but it, like many other responsibilities ultimately resting with particular officials, can be assigned in the first instance to others more intimately acquainted with the project and more advantageously placed to collect and assess the requisite information.

One purpose of the impact statement is to alert both the public and the decisionmakers themselves to

the potential environmental effects of their decisions, so that these effects can be taken into account. See generally *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F.2d 1109 (C.A. D.C.). NEPA is an environmental "full disclosure" statute (*Environmental Defense Fund* v. *Corps of Engineers*, 470 F.2d 289, 290 (C.A. 8), certiorari denied, 412 U.S. 931). But these commendable and altogether necessary goals are served whatever the source of the information, so long as the information is accurate and sufficiently detailed (as the district court concluded that it was in this case).

Both the Department of Transportation (through PPM 90-1) and the Council on Environmental Quality have interpreted NEPA as permitting substantial state participation in the preparation of an impact statement. The Guidelines of the Council (40 C.F.R. 1500.7(c); App. F, *infra*, p. 118a), provide that an agency can rely upon applicants for environmental assessment if it makes its own environmental analysis and "take[s] responsibility for the scope and content of draft and final environmental statements." That is exactly what the Administration did here; it provided guidance and consultation to state officials on their environmental assessment, independently analyzed the statement submitted, and took full responsibility for the contents of the final document. The Council's most recent Annual Report stated: [8]

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[8] Fifth Annual Report of the Council on Environmental Quality 397-398 (1974).

> CEQ has traditionally not objected to delegation of the preparation of a statement in those instances where the Federal agency has maintained responsibility for the objectivity and adequacy of the statement. Efficient use of resources suggests that the party closest to the development of a project should engage in at least its preliminary environmental analysis. Where this party is a state or local government, the responsibility of the Federal agency is to ensure that environmental considerations are meaningfully integrated into the project's design. This requires at least some review of the project and the impact statement by the agency. But it does not require an agency in every case to engage in an independent preparation of the impact statement.

The interpretation of NEPA in PPM 90-1 and by the Council is reasonable and entitled to deference. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210. But what is more compelling is that it is altogether sensible to assign the task of impact statement preparation to state officials. State officials plan highways in the first instance; the location, size and design of highways are matters of state choice. State officials have better access to information and control over the alternatives through which environmental damage may be minimized. The Administration does not direct state highway authorities to build or not to build particular roads or to locate them in particular areas. Federal "approval" is for the purpose of federal funding of state proposals and nothing more. Because of this allocation of functions, state

officials "propose" to federal officials a fully-designed highway. In order for NEPA to fulfill its purpose, the impact statement to which it refers should be made at the same time as that proposal and should "accompany" the state's proposal through the federal project review procedures. Once this stage has been reached the purpose of the impact statement requirement—full environmental investigation and disclosure so that all involved will know and consider environmental effects—has been accomplished.

This does not mean that federal officials have abdicated their responsibility. Because federal funding is involved, the ultimate responsibility is federal. But that responsibility is satisfied when (as here) federal officials participate in and guide the preparation of the impact statement, thoroughly review it at three levels, analyze it, and adopt and publish the statement as their own. They stand fully responsible for any flaws or deficiencies in the estimates or scope.

The court below thought that state officials would prepare a biased statement. But federal officials, like state officials, have a programmatic "interest" in highway construction; both state and federal officials are interested in building and preserving an adequate system of transportation. Neither set of officials has a personal stake in the proposals and there is no reason to believe one will be less objective than the other. Even assuming, however, that state officials might color their presentation more than would federal officials, the comprehensive review procedures established by the Department of Transportation pro-

tect against that possibility. The federal regulations set out in some detail the considerations an impact statement must assess; the statement in this case did so. Indeed, after a full trial the district court concluded that *this* impact statement was substantively adequate. If it were biased, the Administration would be responsible and the project could not go forward. But the proper way to alleviate the problem of bias is to detect and correct it as it arises. There is no need to institute a costly second round of environmental preparation, which will delay every project, merely in order to ameliorate the consequences of bias that may never occur.

2. The court of appeals' holding that the Administration must prepare an impact statement on the entire 280 mile "Route 7 corridor" also warrants review. The Second Circuit's decision here stands alone, and conflicts with decisions in at least five other circuits.[9] See *Trout Unlimited* v. *Morton*, 509 F.2d 1276 (C.A. 9); *Daly* v. *Volpe*, C.A. 9, No. 74-2566, decided March 20, 1975; *Sierra Club* v. *Stamm*, 507 F.2d 788 (C.A. 10); *Sierra Club* v. *Callaway (Trinity River)*, 499 F.2d 982 (C.A. 5); *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11 (C.A. 8); *Movement Against Destruction* v. *Volpe*, 500 F.2d 29 (C.A. 4), affirming 361 F. Supp. 1360, 1383 (D. Md.); *James River and Kanawha Canal Parks, Inc.* v. *Richmond Metropolitan Authority*, 481 F.2d 1280 (C.A. 4), affirming 359 F. Supp. 611 (E.D. Va.).

[9] A middle ground has been taken by the district court in *Appalachian Mountain Club, supra.*

All of the other circuits to consider the matter have held that, when a presently-planned project has independent utility, it may be assessed separately, even though there is a potential for incorporation into a larger project at some future time.

We do not argue that any segment, however small, can be the proper focus of an impact statement. PPM 90-1 properly provides that each segment should be "as long as practicable to permit consideration of environmental matters on a broad scope" (App. F, *infra*, p. 121a). Highway projects cannot be fractured into segments in order to avoid the responsibility of assessing broader environmental concerns. See *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department*, 446 F.2d 1013, 1023 (C.A. 5); *Indian Lookout Alliance, supra*, 484 F.2d at 18. Moreover, we believe that the Administration has a responsibility to examine, in a timely fashion, the overall effects of a decision to build a highway through a long "corridor." In order to make such an assessment a "program impact statement" often will be both necessary and appropriate.

The question presented by this case is, therefore, one of degree. How short a segment is too short? When is the appropriate time to make an overall environmental assessment of a proposal to build a lengthy superhighway? Resolution of these questions, which continually face lower courts in highway construction cases, is difficult because two principles compete for recognition. On the one hand, the overall

assessment must take place soon enough to be useful, so that events do not acquire a momentum sufficient to overcome late-developing realizations of damage to the environment. The environmental concerns must be injected soon enough to affect planning. On the other hand, assessment in a vacuum is a waste of resources. In highway planning, environmental considerations can be dominated by apparently small matters of degree, by the movement of the road a mile to the east or west, by the width of a median strip. Each of these factors, as well as the critical factor of when the state desires to build the road, is within the control of state officials and legislatures. Until those officials have begun the process of proposing and evaluating alternatives, there is literally nothing for federal officials to assess. A "study," in the absence of alternative proposals, would not be long-range planning and projection, but unguided speculation. For courts to require such assessment would waste resources, and not only the resources expended in the study but also those lost because of delay in the construction of segments that everyone agrees will be built regardless of the disposition of some larger project.

Sections 102(2)(A), (B), and (D) of NEPA create environmental duties in addition to the impact statement requirement. Federal agencies must always "utilize a systematic, interdisciplinary approach" to planning, develop methods to take environmental concerns into consideration in all decisions, and study alternatives to every recommended course of action.

But an impact statement itself is required only when there is a "recommendation or report" on proposals for "major Federal actions" significantly affecting the environment. These two additional requirements —"recommendation or report" and "major Federal actions"—provide guidance in solving the refractory problem of the size of the project the impact statement must assess.

The "federal" action involved in highway construction is not the planning or even the construction, but the approval of the expenditure of federal money. We suggest, therefore, that until a state proposes a discrete segment of highway for consideration or construction, there has been no proposal for major federal action significantly affecting the quality of the environment. Without federal action, there is no need for an impact statement. Applied to this case, this principle indicates that the court of appeals was incorrect. A superhighway through the "Route 7 corridor" is a gleam in the eye of planners of three states. None of the states has proposed any federal action; Connecticut and Massachusetts, with their self-imposed bans on current superhighway construction, are not even contemplating making such proposals (App. C, *infra*, pp. 63a-64a). Nor is the "Route 7 corridor," the location of a proposed interstate highway, in which federal involvement (in corridor approval and encouragement) would be arguably more substantial. Because, at least at the moment, proposals or desires to create a superhighway

in the "Route 7 corridor" are entirely state matters, NEPA does not require an impact statement.

Even assuming, however, that the current lack of federal disapproval of the states' hopes can be equated with "major Federal action," we do not believe it follows that an impact statement must necessarily cover the entire 280 mile corridor. Other courts of appeals have developed a rule of reason to delimit the scope of required consideration and have held that if the segment proposed for construction has an independent utility—that is, if it would be useful and desirable whether or not some larger project is commenced or continued—then it can be studied and evaluated as an independent unit. This standard, too, is met by the impact statement prepared in this case. Both the district court (App. C, *infra*, p. 68a) and the court of appeals (App. A, *infra*, p. 19a) concluded that the Manchester-Bennington segment has independent local utility.[10] Once a court has reached this conclusion, it should search no further. No valid interest is served by allowing a local project of independent utility, which will be constructed because of that utility, to be held hostage by objections to a

[10] For this reason, *Scientists' Institute For Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079 (C.A.D.C.), is inapposite. The court in that case required a program impact statement for the breeder reactor program to be issued while that program was in its earliest stages. The early stages, however, were viewed as steps toward the latter, and had no independent utility. Moreover, the "federal action" in the project was obvious. See *Trout Unlimited*, *supra*, 509 F.2d at 1285, n. 13.

larger project that is yet but a vision and may never be proposed, let alone built.

The ultimate deficiency in the approach of the court of appeals is that it failed to come to grips with the problem of timing; it assumed that because eventual construction is a possibility, a complete impact statement is required now. But "now" may be the wrong time, both practically and within the confines of the statute. The Court should take this opportunity to resolve the conflict among the circuits in regard to this important area of environmental law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 63, 288, 341—September Term, 1974
Dockets 73-2629, 74-2168, 73-2715

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL., APPELLEES

v.

SECRETARY OF TRANSPORTATION, ET AL.,
APPELLANTS IN NO. 73-2629

THE VERMONT NATURAL RESOURCES COUNCIL, INC.,
ET AL., APPELLANTS IN NO. 74-2168

v.

CLAUDE S. BRINEGAR, Secretary of Transportation,
ET AL., APPELLEES

TOWN OF ST. JOHNSBURY, INTERVENOR-APPELLEE

Argued Sept. 17, 1974

Decided Dec. 11, 1974

* * * *

Before MOORE, MULLIGAN and ADAMS,* Circuit Judges.

ADAMS, Circuit Judge:

Two cases are consolidated for appeal here because they present an identical issue, namely, whether this

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* Of the Third Circuit Court of Appeals, sitting by designation.

Circuit adheres to the holding of Greene County Planning Board v. Federal Power Commission,[1] that an environmental impact statement (EIS) sufficient to satisfy the requirements of the National Environmental Policy Act[2] must be prepared by the responsible federal agency. We reaffirm that *Greene County* remains the law of this Circuit,[3] and that the Federal Highway Administration (FHWA) must formulate and prepare its own impact statement to assess the environmental effects of proposed federally-funded highway projects.

I. Background.

Objections by environmental groups to proposed Vermont highway construction have generated both these cases, and the defendants in each include the state and federal highway officials.[4]

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[1] 455 F.2d 412 (2d Cir.), cert. denied 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972).

[2] 42 U.S.C. § 4321 et seq. (1973) (NEPA).

[3] *Contra,* Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961, 94 S.Ct. 1979, 40 L.Ed. 2d 312 (1974); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974); Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Finish Allatoona's Interstate Right, Inc. v. Brinegar, 484 F.2d 638 (5th Cir. 1973); Movement Against Destruction v. Volpe, 500 F.2d 29 (4th Cir. 1974).

[4] The Town of St. Johnsbury is the defendant-intervenor in *Vermont Natural Resources Council.* In both cases briefs by amici curiae have been filed and considered.

In Conservation Society of Southern Vermont v. Secretary of Transportation, improvement was planned for a twenty-mile segment of U. S. Route 7 between Bennington and Manchester, Vermont. The district court, Circuit Judge Oakes sitting by designation, granted a permanent injunction in 1972 against proceeding with construction pending compliance with the mandate of NEPA.[5] In 1973, the federal defendants, asserting procedural and substantive compliance with NEPA, moved to dissolve the Route 7 injunction. That motion was denied. Federal participation in preparation of the EIS, Judge Oakes concluded, was scant, perfunctory and insufficient to satisfy the procedures of NEPA as that Act was interpreted in *Greene County.*[6]

Judge Oakes found that the ultimate conversion of the Route 7 corridor into a divided limited-access superhighway through Connecticut, Massachusetts and Vermont is not the subject of an existing federal plan. However, he found that it is nonetheless viewed

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[5] 343 F.Supp. 761 (D.Vt. 1972). The holding that there had been noncompliance with § 4(f), Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), which served as a basis for the original injunction, is not questioned in this appeal.

[6] "There is no indication whatsoever that FHWA or any of its employees conceived, wrote or even edited any section of or passage in the EIS." 362 F.Supp. 627, 632 (D.Vt. 1973).

In contrast to the procedural shortcoming of the EIS, the district court found that substantively the EIS was adequate. There is no appeal from this aspect of the district court opinion.

by the respective state highway departments as a goal "possible of accomplishment with legislative and federal approval over a long-range period of time, with federal approval taking place on an ad hoc basis at the division engineer level." 362 F.Supp. at 636. The district court determined that the FHWA has knowledge of each state's planning process and acts in a "partnership" with the officials of each state respectively. Conversion of isolated portions of Route 7 into a superhighway, the court stated, will produce greater traffic, thus creating synergistic pressure for further construction to connect the newly expanded sections.

The district court therefore held that before the contemplated construction was undertaken, a comprehensive exploration into the environmental impact of development alternatives through the 280 mile corridor was called for. Judge Oakes concluded that there was justification for his order both under NEPA and under the Intergovernmental Cooperation Act of 1968.[7] This appeal by defendants followed.

In the companion case, Vermont Natural Resources Council v. Brinegar, an appeal is taken by environmentalist-plaintiffs from rulings of District Judge Coffrin on several issues relating to a proposed construction denominated the Sleepers River Interchange.[8] The interchange, to be located in St. Johns-

[7] 42 U.S.C. § 4231(b), (e) (1973).

[8] D.Vt., Civ. No. 74-149, order entered Aug. 16, 1974, opinion filed Aug. 21, 1974 (Coffrin, J.). The district court in effect bifurcated the proceedings to enable speedy disposition

bury, Vermont, would provide a highway connection for motorists between U. S. Route 2 (an east-west road) and Interstate I-91 (a north-south road). Without the interchange, those who wished to transfer from one highway to the other would have to leave the highway and pass through the narrow streets of St. Johnsbury. The two principal roadways, Route 2 and I-91, are presently under construction; the sole project at issue before this Court is the proposed interchange.

As envisaged, building the St. Johnsbury interchange would require the channelization[9] of approximately one mile of Sleepers River. The environmentalists sought to enjoin the project because of alleged failures by defendants to comply with federal law. They alleged procedural and substantive violations of NEPA § 102(2)(c).[10] Before the trial court, and here, that the draft and final EIS were prepared by the state agency rather than by the fed-

of the Sleepers River Interchange controversy, designated a matter of "considerable urgency."

By order dated Aug. 26, 1974, a stay pending appeal was issued by a panel of this Circuit pursuant to F.R.App.Proc. 8. The stay was dissolved by the present panel, in an order dated October 23, 1974.

[9] Channelization of a stream, in the context employed here, involves the creation of an artificial stream bed and diversion of a stream from its natural course to the constructed waterway. From perspectives of engineering, ecology and aesthetics, clearly a broad spectrum is comprehended in the term "channelization."

[10] 42 U.S.C. § 4332(2)(C) (1973).

eral agency and observed that, contrary to statute, the EIS did not consider alternatives to the construction. While conceding certain shortcomings in the EIS, the district court found the construction essential and declined to issue an injunction. Noncompliance with the permit requirements of the Federal Water Pollution Control Act of 1972 [11] is also pressed on this appeal as grounds for enjoining further work on the interchange. The district court found that plaintiffs could not maintain such cause of action because they had not satisfied a sixty-day notice requirement established by the Pollution Control Act as a precondition to private suit.[12]

II. The "Responsible Official" to Prepare the EIS.

Consideration of environmental factors in planning major federal projects has been deemed a high national priority. The duty of a federal agency under NEPA is to produce, as part of a determination whether to proceed with a project, a detached and comprehensive analysis of the impact on the environment of such project.[13]

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[11] 33 U.S.C. §§ 1311, 1344 (Supp. 1974).

[12] A claim under the Federal Rivers and Harbors Act, 33 U.S.C. §§ 403, 407 (1970), rejected by the court below, was not pursued in this appeal.

[13] 42 U.S.C. § 4332(2)(C), NEPA Section 102(2)(C), provides in full:

> Sec. 102. The Congress authorizes and directs that, to the fullest extent possible:

[Footnote continued on page 7a]

In *Greene County, supra,* the New York Power Authority, in accordance with the regulations of the Federal Power Commission, prepared and filed with the Commission an impact statement to accompany an application for a new power line. The Commission reviewed and circulated the statement that had been prepared by the Authority, a state agency, in

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[13] [Continued]

> (2) all agencies of the Federal Government shall—
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> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes.

alleged satisfaction of its duty under NEPA. Chief Judge Kaufman held that in so doing, the Federal Commission:

> abdicated a significant part of its responsibility by substituting the statement of [the state agency] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.[14]

NEPA, Chief Judge Kaufman stated, "explicitly requires the [federal] agency's *own* detailed statement" of the expected environmental impact of a major federal action.[15] The Act places "primary and non-delegable responsibility" for preparation of the EIS on the federal agency.[16] Accordingly, *Greene County* held that, to the extent regulations of the Federal Power Commission did not implement Congressional policy, compliance with the Commission's regulations would not satisfy NEPA.

In the highway cases presently before us, the FHWA is the initial decision maker under the Act. While it does not plan, design or construct highways, FHWA decides whether the commitment of millions of dollars of federal money should be allocated to

[14] 455 F.2d at 420 (footnotes omitted).

[15] *Id.* at 421 (emphasis original).

[16] *Id.* at 420.

specific highway projects. Accordingly, having carefully considered the Act, the regulations and precedent, we conclude that FHWA is in the best position to weigh the costs to the environment and the benefits hoped for from the project and then to reach, as it must, a decision based on "its own evaluation of the environmental issues." [17]

A state agency is established to pursue defined state goals. In attempting to secure federal approval of a project, "self-serving assumptions" may ineluctably color a state agency's presentation of the environmental data or influence its final recommendation. Transposing the federal duty to prepare the EIS to a state agency is thus unlikely to result in as dispassionate an appraisal of environmental considerations as the federal agency itself could produce. Judge Oakes declared that:

> [T]he Vermont Highway Department has the duty . . . to follow legislative mandate in regard to proposed highway construction, and the construction here contemplated [Route 7] was legislatively mandated in 1968. Thus, it is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency.[18]

Requiring strict adherence to the *Greene County* rule would provide a clear and effective means to

[17] Council on Environmental Quality (CEQ) Guidelines, 38 Fed.Reg. 20553 (1973).

[18] 362 F.Supp. at 631.

obtain an objective, comprehensive EIS. Furthermore, the beneficial effects of such an approach are substantial.

> [A]ppropriate agency regulations on EIS authorship . . . would shift the initial burden of monitoring compliance with this aspect of NEPA to the agencies themselves, while facilitating ultimate judicial evaluation of such compliance. . . . [T]he case-by-case approach . . . tends to encourage even more NEPA litigation, while at the same time increasing the chance that a legally insufficient EIS might for lack of litigation become the basis for federal decisions made in ignorance of potentially disastrous environmental consequences.[19]

Lodging primary responsibility with the federal agencies would clarify definitively the respective roles of agency and court in effectuating the Congressional purposes. By assuring unambiguous rules, judicial intrusion into what are in essence agency determinations will be avoided wherever possible.[20]

Further litigation before this Court should be rendered unnecessary, or at least kept to a minimum, regarding whether "significant federal participation" or "substantial interaction" between federal and state agencies satisfy NEPA requirements. Nothing

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[19] I-291 Why? Ass'n v. Burns, 372 F.Supp. 223, 246, n. 72 (D.Conn. 1974), appeal filed No. 74-1545 (2d Cir. Feb. 7, 1974).

[20] *Sec*, Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827, 838 (1972).

short of "genuine" [21] federal preparation of the EIS accords with *Greene County.*

The interpretation of the statute by the Council on Environmental Quality, CEQ, has been expressly accommodated to the *Greene County* result.[22] The CEQ guidelines presently read:

> § 7(c). Where [a federal] agency relies on an applicant to submit initial environmental information, the agency should assist the applicant by outlining the types of information required. *In all cases, the agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental statements.*[23]

It is objected that a stringent rule requiring FHWA preparation of the EIS is unmanageable from a practical viewpoint. Upon careful review,

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[21] 362 F.Supp. at 632.

[22] 38 Fed.Reg. 10856, 10865 (1973) (statement accompanying proposed guidelines for the preparation of an EIS; comments to § 7(d)).

[23] Fed.Reg. 20550, 20553 (1973), codified as 40 CFR § 1500.7(c) (emphasis added). The guidelines do permit "the use [after review] of initial information furnished by an applicant in the form of an EIS." 38 Fed.Reg. 10865.

The CEQ published FHWA Policy and Procedure Memorandum (PPM) 90-1 two years prior to issuance of its revised guidelines (102 Monitor, Vol. 1, No. 9, Oct. 1971). Such earlier publication does not provide evidence that CEQ presently approves the procedures outlined in PPM 90-1. The more likely inference is that the 1973 guidelines were intended by CEQ to stimulate agency revision of internal procedures inconsistent with judicial and CEQ interpretations of the Act.

however, it would appear that the problems entailed in conforming to *Greene County* are tractable.[24]

It is contended that the FHWA is not involved in planning a particular project from the earliest stages, and thus does not have the advantage of information available to the state. This handicap is minimized however, for the CEQ guidelines explicitly preserve sufficient flexibility for the federal agency to solicit and integrate information from state agencies.[25] Surely there is no reason to lose the benefit of any work done by the state during initial exploration into project possibilities prior to federal involvement.

Turning now to the cases before the Court, in *Conservation Society of Southern Vermont*, we affirm the judgment of Judge Oakes that the requisite EIS be

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[24] Shortages of both general and expert personnel are cited. However, we agree with the district court in *Southern Vermont* that this difficulty is best addressed to Congress. 362 F.Supp. at 361. Testimony on behalf of the Vermont Highway Department indicated that the FHWA already absorbs that share of the cost of EIS preparation commensurate with its underwriting of construction costs. It has been suggested that states might be asked to continue to pay their portion of costs when the FHWA prepares the EIS. No financial constraints operating on FHWA would thus hamper their ability to prepare the EIS. *See* Comment, The Independent Offices Appropriations Act of 1952; Who Should Pay for the Impact Statement, 3 E.L.R. 10059 (1973); Comment, More on the Independent Offices Appropriations Act of 1952, 3 E.L.R. 10086 (1973). The Supreme Court recently approved a fee assessment by a federal agency under the Appropriations Act. National Cable Television Assoc., Inc. v. United States, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974).

[25] Notes 22, 23, *supra*.

prepared by the FHWA, the responsible federal agency. The injunction prohibiting construction of Route 7 will continue until the requisite EIS is prepared in compliance with the district court order.

In *Vermont Natural Resources Council* a significantly different factual context is presented. To the extent that the district court questioned the need for FHWA compliance with *Greene County*, its opinion is not sustained. But the district court ascertained that, in any event, several factual considerations combined to justify withholding an injunction. Since we have resolved that the district court did not abuse its discretion in making its determination, we affirm the result reached below on this point.[26]

In determining whether to issue an injunction against proceeding with the Sleepers River Interchange, Judge Coffrin found that, under the circumstances, the equities largely favored the defendants. The court pointed to the late stage reached by the

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[26] It would appear that the district court was moved in part at least by what it perceived as significant federal interaction in the preparation of the EIS. In contradistinction to *Conservation Society*, Judge Coffrin found that federal-state cooperation was "much more extensive." Slip Opinion 15. Federal review of the draft EIS was described as "searching." Slip Opinion at 12. In addition, federal agency contributions incorporated into the final EIS were found to be substantial.

While the level of involvement described does not reach the standard reaffirmed by this Court today, Judge Coffrin's findings in this regard help sustain his decision not to enjoin construction in the Sleepers River case until a properly prepared EIS is available.

general construction program,[27] to the very strong considerations of public safety urged by St. Johnsbury into whose streets the I-91 highway traffic must otherwise empty, and to the urgency attending completion of this project.

Although the procedural requirements of NEPA must be followed scrupulously [28] and cost or delay will not alone justify noncompliance with the Act,[29] where the equities require, it remains within the sound discretion of a district court to decline an injunction, even where deviations from prescribed NEPA procedures have occurred.[30] We cannot conclude, based on its factual determinations and its weighing of the equities, that the district court abused its discretion

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[27] Design approval for the I-91 construction was prior to Feb. 1, 1971. I-91 construction in Vermont was in its final phase. Even as to the interchange project at issue here, land acquisition has been completed, contracts have been awarded and construction has begun. Slip Opinion 5-6, 22, n. 1.

[28] Calvert Cliffs' Coordinating Committee v. AEC, 146 U.S. App.D.C. 33, 449 F.2d 1109 (1971); *Greene County, supra*; City of New York v. United States, 344 F.2d 929 (E.D.N.Y. 1972) (3-judge court, Friendly, J.).

[29] *Calvert Cliffs,' supra; Greene County, supra*; Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033 (8th Cir. 1973).

[30] In *Greene County*, the court held that as to certain portions of the power line construction, "[T]here can be no question that the Commission failed to comply with NEPA. . . . Nevertheless we find no compelling basis for halting construction of the lines so far [80%] advanced . . ." 455 F.2d at 424-425. *See also* Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033 (8th Cir. 1973), and cases cited therein.

in refusing to enjoin construction of the Sleepers River Interchange.

III. EIS for the Route 7 Corridor

The defendants appeal from the portion of the order in *Conservation Society of Southern Vermont* that, within six months from issuance by the FHWA of the EIS relating to the 20 mile project, an EIS concerning development of transportation systems in the entire 280 mile Route 7 corridor must be prepared.[31]

Although no plan presently exists for constructing a Route 7 superhighway through Connecticut, Massachusetts and Vermont, the district court made particular findings indicating a long-range goal of superhighway construction by the respective states and the federal government, acting in partnership.[32] Development is apparently foreseen as the piecemeal connection of smaller segments, each considered on an ad hoc basis. It appeared that the FHWA would not consider a comprehensive corridor-long EIS necessary because the highway as an entity would never be characterized as a "major Federal action." [33] Judge Oakes emphasized the undesirable consequences if each isolated increment is approved in ignorance both of the cumulative environmental impact of fragmented growth and of major transportation alterna-

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[31] 362 F.Supp. at 638.

[32] *Id.* at 636.

[33] 42 U.S.C. § 4332(2)(c).

tives that might be planned in lieu of highway construction.[34]

The government advances the contention that the scope of the EIS required by the district court is excessive, first, in view of the nonexistence of any present plans to build the three-state highway, and second, in light of the relatively small portion of road reviewed here.[35]

Under the facts as found, we would not disturb the district court's conclusion that an ultimate Route 7 superhighway is the expectation of state agencies with the knowledge and cooperation of the federal government. We thus must reach the second issue, whether it was beyond the sound exercise of discretion of the district court to order an EIS considerably greater in scope than the specific project before the agency at this time.

Support for the order below may be found in NEPA, which provides that the EIS include consid-

[34] The defendants would cast this determination by the district court as an intrusion into FHWA decision-making inconsistent with the limited scope of review afforded substantive matters. The failure of the FHWA to provide *any* impact statement regarding the entirety of what the district court found to be an ongoing, albeit piecemeal, development is not so sheltered from judicial review. Scientists' Institute for Public Information, Inc. v. A.E.C., 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973); Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972); City of New York v. United States (II), 344 F.Supp. 929 (E.D.N.Y. 1972) (3-judge court).

[35] The Bennington-Manchester Route 7 project is approximately 20 miles in length.

eration of the relation between short and long term uses of the environment, especially where "irreversible and irretrievable commitments of resources" will follow from approval of the proposed project.[36] NEPA also requires that federal agencies "recognize the worldwide and long-range character of environmental problems.[37] For consideration of environmental factors "to the fullest extent possible", CEQ requires review "beginning at the earliest possible point." [38] CEQ reminds agencies that, to be meaningful, impact statements "are to serve as the means for assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made." [39]

[36] 42 U.S.C. § 4332(2)(C)(iv), (v).

[37] 42 U.S.C. § 4332(2)(E). The Senate report accompanying NEPA states expressly that one function of the Act is to prevent decision-making that affects the environment to take place "in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

[38] 38 Fed.Reg. 10856, 10865 (1973).

[39] 38 Fed.Reg. 20550, 20552 (1973). 40 C.F.R. § 1500.2(a) mandates that "in all cases prior to agency decision" a detailed EIS is necessary. Courts also have required impact statements prior to decision-making by agencies. *Calvert Cliffs', supra,* described tardy consideration of environmental factors as a "hollow exercise." 449 F.2d at 1128.

See also Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000, 93 S.Ct. 312, 34 L.Ed.2d 261 (1972); Citizens Env'l Council v. Volpe, 364 F.Supp. 286, 293-294 (D.Kan.), aff'd, 484 F.2d 870 (10th Cir. 1973), cert. denied, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974); Citizens for Clean Air v. Corps of Engineers, 349 F.Supp. 696, 708 (S.D.N.Y. 1972).

The appropriateness of ordering impact statements for entire development programs when a proposal before an agency concerns only one portion of a more massive undertaking is not a novel issue in the courts.[40] In Scientists' Institute for Public Information v. AEC,[41] the plaintiffs sought to force AEC to prepare an EIS regarding the liquid metal fast breeder reactor program to develop fuel for nuclear-powered electric generators. The AEC conceded that at some future time prior to the construction of generator plants an EIS would be required, but the agency ascertained administratively that the program, still in the research and development stages, was not ripe for preparation of an EIS. The Court of Appeals for the District of Columbia disagreed. It reasoned that developments presently occurring required the "irreversible and irretrievable commitments of resources," and that these commitments themselves would curtail *subsequent* broad-scale assessment of alternatives.[42]

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[40] The related question of artificial division of a project into smaller segments for approval is considered in Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973), and Named Individual Members v. Texas Highway Dept., 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933, 92 S.Ct. 1775, 32 L.Ed.2d 136 (1972). The test for whether an isolated highway segment is the proper subject of an EIS appears to be whether the segment has an independent utility, whether it has logical functional termini. PPM 90-1 § 3(a).

[41] 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973).

[42] Id. at 1092. *See also* Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827, 835 (1972).

Judge Oakes was equally concerned with the irretrievable commitment of federal funds to local highway projects without early attention to possible alternatives to highway development. Furthermore, in contrast to the situation in *Scientists' Institute*, where it was clear that an EIS would be forthcoming at some time covering the reactor program, in the Route 7 case it appears that no overall impact statement is likely to emerge spontaneously from the FHWA.

The Bennington-Manchester Road is admittedly a project with local utility. Accordingly, the government asserts that by submitting an EIS for this segment compliance is established with the NEPA mandate to consider the environment from a broad perspective. The FHWA guidelines themselves would seem to answer this contention. Guidelines on the scope of an EIS provide:

> The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. If possible, the highway section should be of substantial length that would normally be included in a multi-year highway improvement program.[43]

Upon careful consideration of the facts, and with a sensitive eye to the options often impreceptibly foreclosed by fragmented growth, we conclude that the legislation, the regulations and precedent appear to afford ample basis for Judge Oakes' determina-

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[43] PPM 90-1 ¶ 6.

tion.[43a] The court thus did not abuse its discretion in concluding that the time was appropriate for early, comprehensive and meaningful consideration of the environmental impact of an alternative to continued highway expansion in the Route 7 corridor."

IV. Consideration of Alternatives at Sleepers River

An attack was leveled by plaintiffs in *Vermont Natural Resources* on the substantive adequacy of the EIS for the Sleepers River Interchange because the EIS did not consider, as required by NEPA, other route locations or the alternative of abandoning the project.[45] NEPA's mandate is clear that agencies

[43a] In a recent per curiam opinion, this Circuit affirmed a district court determination relating to a portion of the Route 7 corridor between Danbury and New Milford, Connecticut. Citizens for Balanced Environment and Transportation, Inc. v. Volpe, 503 F.2d 601 (2d Cir. 1974). In that case the district court dealt solely with the question of whether or not there was federal action in the construction of the Danbury-New Milford portion of Route 7; it did not consider the issue of the necessity for an EIS covering the entire corridor. Thus, the affirmance by this Court of Judge Newman's specific finding does not preclude, and is unaffected by, the present affirmance of Judge Oakes' general findings.

[44] Since we affirm the district court's requirement of a corridor-long EIS based on NEPA, we do not reach the question whether such order might be bottomed on the additional basis asserted by the district court, namely, the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231 (1973).

[45] The EIS shall include a detailed statement of "any adverse environmental effects which cannot be avoided should the proposal be implemented," as well as "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C).

All federal agencies are required to "study, develop, and describe appropriate alternatives to recommended courses of

must accord thorough heed to the environmental impact of reasonably available options prior to a formal determination to pursue a course of action.[46] While consideration of every conceivable alternative is not necessary, "what is required is information sufficient to permit a reasoned choice of alternatives . . . ."[47] Generally an EIS must consider the possibility of doing nothing as well as various ways to achieve a certain end.[48]

The EIS here, in violation of NEPA, did not include a discussion of the environmental impact of not building the Sleepers River Interchange. Despite this failure, a constellation of facts contributed to the district court's conclusion that no injunctive relief was warranted in the case before it. Plaintiffs contend that a clear violation of NEPA justified injunctive relief against defendants pending compliance with the statute. Ordinarily, we would not take issue with a

action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(D). *See also* S.Rep. No. 91-296, 91st Cong., 1st Sess. 21.

[46] Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972), Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972); Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S.App.D.C. 385, 463 F.2d 783 (1971).

[47] Natural Resources Defense Council, Inc. v. Morton, *supra*.

[48] Monroe County Conservation Council, Inc., *supra*.

rule that, where other things are equal, a clear violation of a statute embodying a strong national policy merits injunctive relief. But here the district court found that the equities clearly and strongly favored the defendants.

Three grounds, each supported by the record, provided the basis for the district court's result. We need not decide today whether fewer than the sum of these would justify withholding injunctive relief, for here all were present.

First, the district court found that the general I-91 highway project and the Sleepers River Interchange were at an advanced stage of completion. I-91 when complete will provide highway transportation in Vermont from the Massachusetts border north to Canada. Most of the construction phase is ended and all but 24 miles of I-91 are in operation in Vermont.[49] The I-91 portion to be serviced by the interchange was almost finished, and the interchange was found necessary to provide adequate access to I-91. The land acquisition program for the interchange right of way was accomplished. Contracts had been let and construction had begun except for actual diversion of the river bed.[50]

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[49] It was stated at oral argument without contradiction that approximately 80%, or 3,900 feet of the 4,800 foot-long channelization of Sleepers River was attributable to the I-91 construction to which no objections are raised.

[50] The late stage at which this construction has been subjected to attack provides a vivid contrast to the situation in *Southern Vermont*, the companion case here, where the district court ordered early contemplation of alternatives,

Second, granting an injunction appeared unjustified where the outcome was virtually undisputed, where the affected resource was not "so environmentally unique [as to require] any special consideration," [51] and where extensive and thoughtful consideration had been given to mitigating the adverse environmental consequences of the project. Thus, the court found that the interchange was essential "for the benefit of the traveling public and the effective utilization of I-91" [52] as well as for the safety and general welfare of the citizenry of St. Johnsbury. Elimination of the interchange, the court found, was "a very remote possibility" [53] and alternative proposals were "impossible to realistically implement because of adverse terrain." [54] Further, in preparing plans for the actual construction, exhaustive efforts had been expended to preserve the ecological value of the river, notwithstanding the channelization.[55]

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permitting a more meaningful appraisal. *Greene County, supra; Arlington Coalition on Transportation, supra; Calvert Cliffs', supra.*

[51] Dist. Court slip opinion at 24. The Court noted that although six alternative routes were suggested in the final EIS for the remaining 24 miles of I-91, all contained identical plans for the Sleepers River Interchange.

[52] *Id.* at 23.

[53] *Id.* at 24.

[54] *Id.* at 19.

[55] *Id.* at 21-24. In the course of review prior to issuance of the final EIS, there had been meetings with the U. S. Department of Interior Fish & Wildlife Service and the Vermont Fish & Game Department. Many aspects of construction were

Third, Judge Coffrin found that the heavy damage to defendants to be expected from an injunction militated against its issue. Delay and concomitant cost increases would not alone justify noncompliance with the Act.[56] Here, however, the court found that until the interchange was complete the town bore an "impermissibly heavy traffic burden,"[57] comprising the quality of life in the town and the safety of its inhabitants. Also, construction would provide jobs in an area of high unemployment.[58] On the other hand, the delay occasioned by an injunction would be especially costly because of the curtailed construction season in northern Vermont, which would, in effect, postpone the job an entire year, although a far shorter period might be required to comply with NEPA.

The district court gave the above reasons for withholding injunctive relief notwithstanding the violation of NEPA in regard to contemplation of alterna-

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tailored to incorporate suggestions to alleviate the environmental impact of channelization, directed to flood control and the preservation of the fishing, recreational and aesthetic value of the stream. Some of the modifications involved placing a natural boulder fill in the channel, designating the steepness of the banks and the depth of the channel, and planting shade trees to keep down water temperature, to hold the soil and to promote the growth of other vegetation.

[56] *Greene County, supra; Calvert Cliffs', supra.*

[57] Slip opinion at 18.

[58] *Id.* at 35. This would appear to be of no consequence if the ultimate outcome were in substantial doubt, but such was not found to be the case.

tives in the EIS for the Sleepers River Interchange. When all the pertinent facts are considered, we cannot say the district court abused its discretion in so deciding.[59]

V. The Federal Water Pollution Control Act Claim

The plaintiffs in *Vermont Natural Resources Council* also contend that the district court erred by concluding it lacked jurisdiction to entertain a claim that defendants' channelization of Sleepers River violated the Federal Water Pollution Control Act (FWPCA) Amendments of 1972.[60] The court concluded that only by waiting sixty days after giving notice to the administrator, the state, and the alleged

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[59] Aberdeen & Rockfish RR. Co. v. Students Challenging Regulatory Agency Proceedings (SCRAP), 409 U.S. 1207, 1218, 93 S.Ct. 1, 34 L.Ed.2d 21 (1972) (Burger, C. J., sitting as Circuit Justice).

[60] 33 U.S.C. § 1251 et seq. (Supp. 1974).

Section 1311(a) provides:

> Except in compliance with this section and [section 1344] of this title, the discharge of any pollutant by any person shall be unlawful.

Section 1344(a) states:

> (a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

"Pollutant" is defined in 33 U.S.C. § 1362(6) to include dredged spoil, rock, and sand.

violator as required by the statute [61] could plaintiffs obtain review of the defendants' actions.

After careful consideration we are not persuaded that Congress intended the sixty-day notice provision to erect an absolute barrier to earlier suit by private citizens under the FWPCA.[62] However, we decline

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[61] 33 U.S.C. § 1365(a) reads in pertinent part:

> [A]ny citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter . . . .
>
> * * * *

33 U.S.C. § 1365(b) reads:

> No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order . . . .

[62] See Natural Resources Defense Council, Inc. v. Train, —— F.2d —— (D.C. Cir. 1974). Ordinarily, the 60-day notice provisions must be adhered to prior to initiation of suit under the FWPCA. The purpose of the 60-day notice procedure of § 1365 is to provide the Administrator time to launch governmental enforcement of the FWPCA in lieu of enforcement through private citizens suits. *See* Sen.Rep. No. 92-414, 92nd Cong., 1st Sess., 79-80 (1971); 1972 U.S.Code Cong. & Admin. News 3668, 3745.

However, a crabbed construction of § 1365 which would elevate the 60-day rule to the position of an absolute barrier to earlier suit fails to account for § 1365(e), which preserves

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all private rights to sue for relief under any statute, or common law. Moreover, a review of the legislative history of § 1365 and its prototype, § 304 of the Clean Air Act, supports the conclusion that the provisions for obtaining judicial review set forth in § 1365 were not intended to eliminate avenues previously available to citizens seeking enforcement of the Act, but were rather intended to provide citizens with an additional remedy. Section 304 of the Clean Air Act, 42 U.S.C. §§ 1857h et seq., was the model for the citizen-suit provision of the FWPCA, and is substantially identical to § 505 of the FWPCA. *See* Sen. Comm. on Public Works (Library of Congress) A Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Jan. 1973) (2 vols.), at 820, 1497. *See* Sen. Comm. of Public Works, A Legislative History of the Clean Air Amendments of 1970, 93d Cong., 2d Sess. (Jan. 1974) (2 vols.) at 436-439.

Although it appears that no court has expressly ruled on whether the § 505 procedure is the exclusive means of obtaining review of agency action under the FWPCA, district courts have in fact exercised jurisdiction over FWPCA claims based on other jurisdictional statutes. *See, e.g.*, Scenic Hudson Preservation Conference v. Callaway, 370 F.Supp. 162 (S.D. N.Y. 1973), aff'd 499 F.2d 127 (2d Cir. 1974) (establishing jurisdiction to grant permanent and injunctive relief for alleged violation of § 404 of FWPCA under 28 U.S.C. § 1331 and the APA, 5 U.S.C. §§ 701-706); Natural Resources Defense Council, Inc. v. Quarles, —— F.Supp. —— (Civil No. 1629-73, D.D.C., Feb. 1, 1974). *See also* City of Highland Park v. Train, 374 F.Supp. 758 (N.D.Ill. 1974), in which the court held that it had jurisdiction under 28 U.S.C. § 1331 to review the failure of the EPA Administrator to promulgate regulations in conformity with the Clear Air Act, 42 U.S.C. §§ 1857 et seq.

Abbott Laboratories v. Gardner announces the standard to be applied:

> [J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is per-

to remand the case for a determination of the merits of plaintiffs' claims. Assuming arguendo that the district court had jurisdiction [63] over the FWPCA claims and, assuming further that a stream channelization project such as the one here would require a permit under the Act, we would not employ the equitable powers available to this Court to enjoin further construction of the Sleepers River Interchange until such a permit is obtained. As already pointed out, granting such an injunction would cause serious harm and inconvenience both to St. Johnsbury and to the general travelling public. The purposes which would be served by enjoining construction at this late date are simply not sufficiently weighty to balance the injury which further delays would cause.

Accordingly, the judgment of the district court in each of these cases will be affirmed.

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suasive reason to believe that such was the purpose of Congress.

387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). *See also* PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718, 733 (3d Cir. 1973) (dissenting opinion).

Since a "persuasive reason" does not appear in this case, the notice requirements of § 505 would not operate as a total jurisdictional bar to entertaining plaintiffs' claim.

[63] Plaintiffs assert that the district court had jurisdiction to review under either the federal question statute, 28 U.S.C. § 1331, or the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

APPENDIX B

UNITED STATES DISTRICT COURT
D. VERMONT

Civ. A. No. 6598

June 2, 1972

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL.

v.

JOHN A. VOLPE, Secretary of Transportation, et al.

FINDINGS OF FACT, OPINION AND ORDER

OAKES, Circuit Judge (Sitting by Designation).

The above matter came on for hearing on May 22, 24 and 25 on plaintiffs' application for preliminary injunctive relief. By consent of the parties and order of the court, pursuant to Fed.R.Civ. P. 65, the hearing was transposed into one on the merits, i.e., plaintiffs' application for permanent injunctive relief. Defendants waived any objection to plaintiffs' standing to sue, Scenic Hudson Preservation Conference v. FPC(I), 354 F.2d 608 (2 Cir. 1965), cert. denied, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966), except as to plaintiff The Vermont Association of Railway Passengers, and the court finds that the individual plaintiffs, as residents and citizens of Bennington County, Vermont, as well as plain-

tiff The Conservation Society of Southern Vermont, Inc. ("The Society"), of which they are members, have the requisite personal interest or stake in the outcome of this litigation under Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (Apr. 19, 1972), to maintain it. No showing having been made as to any standing of The Vermont Association of Railway Passengers, the complaint is dismissed as to it. Plaintiffs called four witnesses, defendant State of Vermont three, and defendant Volpe one. The court has considered all documentary and photographic proof offered, and makes the following findings of fact.

FINDINGS OF FACT

1. Bennington County, Vermont, is located in the southwest portion of the state and is a county of great scenic beauty, consisting of valleys, hills, glacially formed mountains (Taconic and Green), forest areas, some remaining pastoral scenery located primarily in the valleys, village and small towns, along with the larger towns, which are also highway crossroads, of Bennington and Manchester, Vermont, the former known for its college and varied residential-commercial and industrial economy, the latter known primarily as a winter-summer recreation area with four-season homes nearby.

2. Bisecting Bennington County, primarily running through the valley floors between the north-south range of Green Mountains and the more or less

parallel north-south range of Taconic Mountains to the west, is U.S. Route 7, a major highway that runs through western Connecticut and Massachusetts, through Bennington County to Vermont's two major cities, Rutland and Burlington, and thence to the Canadian border where it leads to Montreal. Over 90 per cent of the County's population is in the towns through which Route 7 passes (Gov.Ex. 4, p. 4), but the highway itself is especially scenic since the principal valley land which it traverses is only 3 to 6 miles wide and the parallel mountain ranges that border it rise abruptly 2,000 feet or more in altitude from the valley floor. It is truly an area with the stuff of which poetry is made; one of Robert Frost's five Vermont farms lay there.

3. The average daily flow of traffic on Route 7 as of 1968 varied from 3,500 to 4,500 vehicles, rising to more than 13,000 per day (one of the highest in the State of Vermont) in the busy commercial center immediately to the north of Bennington Village. The design of Route 7 is obsolete for much of its length, in view of present day traffic patterns and volumes, being winding, narrow, hilly, with short sighting distances, relatively sharp curves, limited to two lanes, and presenting hazards to the traveling public as well as the local populace. It has, however, been improved in certain stretches, particularly in that part of the County north of Manchester.

4. Improvement of Route 7 has been talked about for at least 15 years, has been in various stages of highway thinking, planning and design for 8-10

years, has been in part the subject of a legislative mandate for construction since 1966, and is necessary not only to highway safety but also to the long-range planning needs of the County, as set forth in the Regional Plan, Bennington County Vermont Regional Planning Commission (1970) (Gov.Ex. 4).

5. "Design approval" as a term in highway thinking is new, originating after enactment of the National Environmental Policy Act (NEPA) and Department of Transportation regulations adopted, if not in accordance therewith, in accommodation thereof. "Design approval" is a term of art, so to speak, in that prior to the adoption of those regulations there was no formal step or procedure whereby the federal government, acting through the now defunct (if not extinct) Bureau of Public Roads, gave its "approval" to the "design" of any highway. The court finds, nevertheless, that, as explained in the testimony and particularly in Government Ex. 6, by Albert R. Purchase, longtime Division Engineer for the Bureau and the Federal Highway Administration (FHWA), design approval within the meaning of PPM 90-1 (DOT-Fed. Highway Adm'n) transmitted under date of August 24, 1971, Para. 5(e), was had for the following Route 7 projects as of July 17, 1968:

> F 019-1(6); F 219-1(7); F 109-1(8); AP 019-1( ), F 110-1( ), AP 019-1( ); F 019-1(9) (except for the northerly 1.47 miles thereof, as to which there was no design approval until January 26, 1971.

The court limits this finding to the proposition that in substance the overall route, line, or general location was submitted by the state highway department to the federal agency and received substantial acceptance therefrom subject to minor refinements of line and such lesser changes as might be made in the course of survey, design and right of way acquisition. This finding is made by a court bearing in mind that so-called Section 222 hearings (19 V.S.A. § 222) were not held by the State until later and that so-called "design hearings" (a creature of PPM 20-8) were not held until after such "approval" had been granted, the "hearings" being intended to comply with an entirely new federal regulation or set of regulations (contained in PPM 20-8, issued on or about January 14, 1969, under the Federal-Aid Highway Act and the Department of Transportation Act). "Design approval" in this narrow and limited sense means general approval of an overall line, and is subject to specific engineering changes resulting from the preliminary survey and objections voiced by communities and landowners affected by the proposed route, as well as by ecologists.

6. No design approval in any sense of the term was had for the following projects until January 21, 1971: AP 219-1( ), F 110-1( ), AP 219-1( ), the southerly half of the so-called Bennington Belt-Line; and until January 26, 1971, the northerly 1.47 miles of Project F 019-1(9) leading easterly of the village of Manchester. No such approval has been had for any other Route 7 improvements other than those already construction-complete.

7. So-called Arterial 7, consisting of Projects F 019-1(6) and F 219-1(7), and meeting the highest traffic-flow requirements of the area (see Finding No. 3 above), is independent of and unrelated to the other projects in question; the construction of Arterial 7 is at a further stage of progress than any of the other projects; completion of Arterial 7, consisting mainly of re-routing and improving the traffic through and to the immediate north and south of Bennington Village will not require or affect the planning or construction of any other portion of Route 7; and such completion is necessary at the earliest possible moment both from a traffic and a cost standpoint. There are no foreseeable substantial adverse ecological or environmental effects of construction, were continuation of pending plans and completion of construction of Arterial 7 as above defined to occur.

8. Despite "design approvals" on July 17, 1968, of Projects F 019-1(8) and (9), and on January 21, 1971, of Projects AP 219-1( ), F 110-1( ), AP 219-1( ) January 26, 1971, of Project F 019-1(9)'s northerly 1.47 miles, there are substantial ecological and environmental effects that may occur if the present highway design of these projects is pushed to completion, that have not been adequately considered by the federal and state highway engineers and that may, with relative ease of design and right of way acquisition, be avoided in any future construction. These effects—cognizable even from only a limited exploration of the area by the plaintiffs'

expert ecologists—indicate that a review of environmental effects along this major portion of the proposed relocation of Route 7 is required to avoid upsetting ecological balances and to avoid the destruction of invaluable environmental resources. Any delay occasioned by such a revaluation—estimated by government witnesses to take one year—will cost the defendants little or nothing because design and acquisition of these portions of the highway have not reached a stage where bids are ready to be let, and many indeed preserve ecological values which will be cherished by succeeding generations although they may seem to some to be of little or no meaning now.

9. Specifically included in the adverse effects that may occur are those (1) to Jewett's Brook and its wetlands and marsh, which have botanical significance and require soil stabilization (avoidance of siltation and sedimentation together with preservation of the quality of run-off), and which attract significant and rare birdlife; (2) to Harrington's Cobble, an abruptly rising limestone hillock with a peculiar profusion of herbs and wildflowers, unique in Bennington County; and (3) to a portion of the Chiselville beaver pond with adjacent marshes containing a botanically unique juxtaposition of wetland softwoods and hardwoods, with concomitant aquatic vegetation. Upon a re-survey of the ecological effects of these proposed highway projects other similarly significant wilderness or semi-wilderness areas may be uncovered with substantially equivalent long-range significance ex-

tending well beyond the short-term highway use to which defendants intend to appropriate them.

10. There has been a degree of "community involvement" in connection with the proposed highway changes, but—on the somewhat scanty record before the court in this respect—the communities, as exemplified by Government Ex. 2, have been more concerned with local socio-economic and short-range effects of highway improvement, rightfully including increased highway safety, to be sure, than with the long-range preservation of the environment. This environment helps to make Bennington County, and the state in which it is situated, an example which the rest of the United States would be fortunate to be able to emulate.

11. The state highway department has, before any National Environmental Policy Act, valiantly attempted in the past few years—in which there has been a rapidly expanding public consciousness of environmental impact—to examine the environmental effects of proposed highways. This concern, genuine if belated, has manifested itself by, for example, calling in Dr. Frederick Mould, an acknowledged wetlands expert, to advise on the Jewett's Brook marsh here involved, and following his advice to the extent of moving the proposed line easterly—all of this only after the department's attention was called to this by plaintiff's counsel. At the hearing the concern manifested itself further in the testimony of one of the state engineers who indicated that, by "squeezing" the median strip of what ultimately

is apparently planned as a four-lane highway, any major damages to Harrington's Cobble might be avoided within the limits of the present design and right-of-way acquisitions now in process. Like that of other departments, state and federal, the environmental attention now being paid by the Vermont state highway department may be both too little and too late, but not so little or so late that a thorough review of environmental impact, followed by what probably are simple design-engineering changes, will still be sufficient to save the day.

CONCLUSIONS OF LAW

This court rejects the broad view of plaintiffs that the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), requires an impact statement where any highway project was incomplete as of January 1, 1970, the effective date of NEPA, as well as the narrow view of defendants that no NEPA statement is required if there were "design approval" of a given highway project before the date of February 1, 1971 (the time which DOT apparently thought a reasonable one for the implementation of NEPA, as per PPM 90-1 § 5), or at least before the January 1, 1970, effective date of the governing act. In so holding, the court has considered the leading cases, Hanly v. Mitchell, 460 F.2d 640 (2d Cir., May 17, 1972); Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972); and Calvert Cliffs' Coordinating Committee v. AEC,

449 F.2d 1109 (D.C.Cir.1971). The court bears in mind and agrees with the conclusion of Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971), that highways may not be broken into such short segments that the public is effectively left without remedy in the event that two non-adjoining segments are approved. This rule of law is found inapplicable, however, to Arterial 7, as defined in the findings, since that portion of defendants' proposals is entirely independent of the remainder of them. In rejecting defendants' narrow view of the law the court has in mind the decision in Arlington Coalition of Transportation v. Volpe, 458 F.2d 1323 (4th Cir., Apr. 4, 1972), holding that "design approval" is not determinative but that the key question in respect to highway NEPA statements is whether the highway "has reached the crucial stage. . . ." Parenthetically, we note that NEPA is not the sole federal act involved; compliance with section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), and with section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, is also required, and the court's references to conformance with NEPA requirements are not intended to by-pass the other applicable statutes.

In rejecting plaintiffs' broader view, however, the court has in mind the decisions of the Third Circuit in Concerned Citizens of Marlboro v. Volpe, 459 F.2d 332 (Apr. 28, 1972), and Pennsylvania Environmental Council v. Bartlett, 454 F.2d 613 (3rd Cir. 1971), holding that "design approval" together with federal commitment of funds before January 1, 1970, makes NEPA inapplicable to highway projects. The views of the Third Circuit on the one hand and the Fourth Circuit on the other are not necessarily irreconcilable, however, insofar as the projects in this case are concerned. The better view, which this court adopts as its own, seems to be that taken impliedly by the Second Circuit in Hanly v. Mitchell, *supra*, and expressed explicitly by District Judge Peckham in Environmental Law Fund v. Volpe, 340 F.Supp. 1328 (N.D.Cal., Mar. 22, 1972). He held that in determining the applicability of NEPA to projects pending as of January 1, 1970, the test is that suggested by the Council on Environmental Quality in its guidelines to other federal agencies, viz., to apply NEPA, or more particularly its section 102(2)(C) [42 U.S.C. § 4332(2)(C)] requirement of an "impact statement," to pending projects "to the maximum extent practicable." This in turn requires the court in each instance to balance appropriate factors, including but not limited to (1) community participation in the decision-making process (we have seen how this is relatively unimportant in this instance); (2) the extent to which the state agency has taken environmental factors into account (it is easier to find inadequacies by hindsight, especially when the public concept of what constitutes ecological value has been changing as rapidly as it has in the past decade); (3) the substantiality and

likelihood of harm to the environment if the project is constructed as planned; and (4) the cost to the state measured in terms of dollars and to the public in terms of safety if substantial delay in completion of the project occurs. This view of the law *assumes* of course that impact statements will be required as to any project such as the Beltline here [AP 219-1 ( ), F 110-1( ), AP 219-1( )], which affects Jewett's Brook and its marshes but the design of which was not approved until *after* the effective date of NEPA. In other words, this court rejects out of hand the attempt of DOT to extend the effective date of NEPA by regulation (PPM 90-1) to February 1, 1971. The attempt has support neither in the Act itself nor in administrative necessity. The fact that there were thousands of on-going highway projects on the effective date of NEPA does not make the Act less effective. We thus weight the other projects in the scales established, however crude they may be..

It follows from the findings in respect to Arterial 7 project—its independence from other projects, its traffic importance, and the lack of any showing of even trivial environmental significance—that it may proceed to completion under the tests above enunciated. On part of this improvement bids have been opened and must be accepted or expire before June 5, 1972; on another part they are ready to be let.

It equally follows as to that part of the affected projects north of Arterial 7 and extending northerly from just south of the Bennington line almost to

Manchester that if there has been any substantial showing of potential serious environmental harm, an impact statement must be filed, at least where, as here, the project has not become so final in engineering detail as to be ready to submit to bid. In making this judgment the court is well aware of and concerned by highway safety problems engendered by any delay that might result; with right-of-way acquisition still in process, however, any delay from impact statement making (and possible re-design) is not of substantial significance.

What then of the initial or prima facie showing by plaintiffs of environmental significance? They chose, on which to rest their case, a sharply-rising little limestone hill—a "Cobble" as it is called in this section of the country—and a beaver pond, of which Vermont has many hundred, but which at Chiselville has a rather extraordinary botanical significance. Will highway development be held up for one little hill and one beaver pond?

". . . [I]n Wildness is the preservation of the World." So says Thoreau; the Sierra Club has issued a beautiful book on this theme, bearing this title. "Every tree sends its fibers forth in search of the Wild," the Concord philosopher continues: "[t]he cities import it at any price." Indeed, the people come to Vermont from the cities because they cannot "import it." Wildness may not be shipped; it stays where it is, broken only by the intrusion of man. "Men plow and sail for it," Thoreau says, adding, "[f]rom the forest and wilderness come the tonics

and barks which brace mankind." To those of us who are so fortunate to live in Vermont and to have a little wildness surrounding us, it is probably not so difficult as it may be for others to conceive in terms of the preservation of all mankind of the importance of a little limestone hill rising abruptly from a valley floor, covered with basil and marjoram and creeping thyme, with columbine and yellow ragwort in dramatic abundance.[1] The more so any of us find it difficult to conceive of the lasting, indeed the underlying importance of wetlands or bogs—perhaps because understandably we do not recognize, or we wish to forget, our own insignificant beginnings in what Judge Learned Hand called the "primordial ooze."

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[1] See G. Taggard, "The Nursery Rhyme and the Summer Visitor," A Part of Vermont (1945), quoted in Time in New England 231 (1950):

Green Mountain Mary, Green Mountain Mary,
What does your garden grow
Violets, moss, ground pine, goldenrod, briars,
Strawberries, hardhack, wintergreen, ferns,
And a little bit of grass, alas.
Will you sell me your meadow?
  Oh, no.
Who crops it?
  Deer.
See here, Green Mountain Mary, you
  people are very,—
Excuse me—
Queer.

And see G. Aiken, Pioneering with Wildflowers *passim* (1935).

We may agree with the authors of a newly published book [2] that "[t]here is then no 'balance of nature' unless it includes man as part of the balance . . . ," even while we "desire to conserve nature in many instances for unabashed aesthetic reasons and hold that these are basic, necessary and indeed do define the nature of man on a par with energetics, economics or any other reason; moreover we have Gorky's charge that aesthetics will be the ethics of the future."

The policy of the United States in the judgment of this individual federal judge is that an environmental impact statement is required before commencement of construction of the projects north of Arterial 7 to Manchester, wherein lies some of the most beautiful, semi-wild and pastoral countryside in this nation, in addition to the similar requirement relative to the Beltline, above mentioned. An injunction will issue accordingly and plaintiffs are ordered to submit such for approval; construction of Arterial 7 may proceed without further delay, however, and the injunction will be framed accordingly.

Judgment in accordance with opinion.

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[2] D. Wetherbee, R. Coppinger & R. Walsh, Time Lapse Ecology, Muskeget Island, Nantucket, Massachusetts (1972), *quoted in* Vineyard Gazette, May 26, 1972, at 2-B, col. 3.

APPENDIX C

UNITED STATES DISTRICT COURT
D. VERMONT

Civ. A. No. 6598

July 27, 1973

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL.

v.

SECRETARY OF TRANSPORTATION, ET AL.

FINDINGS OF FACT, OPINION and ORDER

OAKES, Circuit Judge.

The above entitled action came on for hearing on the motion by the defendants Secretary of Transportation and David B. Kelly, Division Engineer, Federal Highway Administration (FHWA) (hereinafter the "federal defendants") and H. James Wallace et al. (hereinafter the "state defendants"), filed jointly on March 20, 1973, for an order dissolving this court's injunction of October 26, 1972. *See* 343 F.Supp. 761 (D.Vt.1972). The ground for dissolution was that the environmental impact statement (the EIS) required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), ordered to be filed by this court had been duly prepared and filed and was sufficient and that the

identical requirements of § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f), and § 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 [hereinafter sometimes jointly referred to as § 4(f)], had been duly met. Following preliminary argument on the motion to dissolve the injunction, on April 23, 1973, evidence was taken on May 10 and 11, 1973, and the parties granted leave until May 24, 1973, to file additional memoranda and supporting materials. At the time of the taking of the evidence, for the limited purpose of filing memoranda of law, The Natural Resources Defense Council, Inc., and a number of other conservation-oriented organizations, national, regional and local, were granted leave to appear as amici curiae.

The parties have briefed, and evidence was taken on four issues:

1. Whether the EIS was prepared by, or under the supervision of, the Department of Transportation, and whether it was required so to be prepared;

2. Whether the EIS as filed met the requirements of NEPA, *i.e.*, was sufficient;

3. Whether the Bennington to Manchester, Vermont, segment of Route 7 proposed to be constructed and covered by the EIS was simply a part of a larger plan or proposal for an improved Route 7 in the states of Connecticut, Massachusetts and Vermont so as to require an EIS for the entire length of existing Route 7; and

4. To what extent certain United States Forest Lands would be used or affected by the proposed highway, and how such use or effect relates to the requirements of § 4(f).

Each of these issues and the evidence in respect thereto will be discussed separately below, so as to present a full record for any appeal, and the discussion in respect to each shall be treated as findings of fact and conclusions of law thereon.

I. *Whether the EIS constituted a "detailed Statement by the responsible official" within NEPA § 102 (2)(C).*

On its face or cover sheet the EIS shows that it was "[p]repared by Vermont Department of Highways." This was done pursuant to the Department of Transportation's (DOT's) Policy and Procedure Memorandum (PPM) 90-1 which specifically provides that a state highway agency shall prepare and circulate a draft EIS in cooperation with the FHWA, ¶ 6b, "shall prepare a final environmental statement or combined environmental/4(f) statement in consultation with the FHWA . . .," ¶ 6i, and that "FHWA review and adoption of the final impact statement shall be the responsibility of the Regional Federal Highway Administrator." ¶ 6j. Here the regional FHWA office essentially delegated consultation duties in regard to the EIS to the federal division engineer in Vermont, defendant Kelley. He in turn commented on the draft EIS primarily through his engineering coordinator, Gordon Hoxie. Mr. Hoxie

maintained frequent contact with the Vermont Highway Department (VHD) during the course of the work involved in preparation by the VHD, or more specifically the rural planning section of the VHD. The individual primarily responsible for the writing and preparation of the EIS was VHD planning engineer Arthur Goss. During the time of EIS preparation engineer Hoxie was in verbal communication with VHD's Goss two or three times weekly. On one occasion FHWA division engineer Kelley went on a field trip, during which the proposed route was examined and environmental considerations noted and discussed, with representatives of the VHD accompanied by two independent environmental consultants, Frederick H. Mold and William C. Horsford, as well as by representatives of the Vermont Fish and Game Department. After a draft EIS was prepared by the VHD in consultation with but not under the supervision of the FHWA it was submitted to the public for comment and to the division office of FHWA in Montpelier, Vermont, and the regional office in Delmar, New York.

The division office, and more particularly Mr. Hoxie as engineering coordinator and the right of way officer, the planning engineer and the area engineer all reviewed the EIS. At the regional office the draft EIS was examined by Donato J. Altobelli, director of the Office of Environment and Design, who in turn circulated it to a FHWA "Regional Task Force" for consideration. This "Task Force" consisted of Mr. Altobelli and his assistant, bridge and

construction engineers, a hydraulics engineer, a landscape architect, a "regional relocation specialist," a regional urban planner and the Deputy Regional Federal Highway Administrator. It considered the draft EIS and through Messrs. Kelley and Hoxie submitted a letter to the VHD under date of October 10, 1972 (EIS at 428), commenting generally that it thought the EIS to be "a good representation of the adverse and beneficial environmental impacts of the proposed projects" and specifically making only three suggestions as follows: (1) calling for more "discussion of" the 25 improvements that will be taken and the persons displaced; (2) suggesting inclusion of "an assessment of the impact which the highway will have on future land uses of the surrounding area" and as a corollary the effect of the highway on residential and business property values; (3) calling for more discussion of the probable impact of the recommended alignment on the local area tax base.[1] Apparently all three of the suggestions of the FHWA were incorporated by the VHD in the final impact statement.

This case thus raises the very fundamental question whether FHWA procedures requiring preparation of an EIS by the local state highway agency, with communication from and cooperation of the re-

[1] Parenthetically the court notes that the only one of these suggestions relating directly to the environment is No. 2, and in that connection how an impact statement could be prepared without including an assessment of the impact on future land uses in the surrounding area escapes one.

gional FHWA, followed by review by an FHWA "task force" at the regional level complies with NEPA and more particularly NEPA as construed by the Second Circuit Court of Appeals in Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L. Ed.2d 90 (1972). In *Greene County*, it will be recalled the Second Circuit (per Kaufman, C. J.) held that in a procedure involving the licensing of transmission lines, the FPC could not properly merely review and circulate an EIS prepared by the Power Authority of the State of New York (PASNY, an independent state agency interested in power development), but had the "primary and nondelegable responsibility" to "consider environmental values 'at every distinctive and comprehensive stage of the [agency's] process.'" 455 F.2d at 420. Put another way, has the FHWA here, as the FPC was found to have done in *Greene County*, "abdicated a significant part of the responsibiilty by substituting the statement of [the VHD] for its own"? 455 F.2d at 420.

The federal defendants argue that the VHD is unlike PASNY in the *Greene County* case and is in no sense an "applicant or contestant." Thus they argue that there is no likelihood that the EIS prepared by the VHD would be based upon the "self-serving assumptions" that the Second Circuit was particularly wary of in *Greene County*. In support of this purported distinction the federal defendants cite two United States District Court cases, National

Forest Preservation Group v. Volpe, 352 F.Supp. 123 (D.Mont. 1972), and Iowa Citizens for Environmental Quality, Inc. v. Volpe, 4 ERC 1755, 1759-60 (S.D. Iowa 1972), the former holding that there was no indication that the EIS in the particular case was "self-serving" to the local highway department and that "It should not be presumed that states are not concerned with the environmental problems facing us all." 352 F.Supp. at 127. However true this may be, *Greene County* requires a different result. In Vermont, at least, the Vermont Highway Department has the duty, as testified to by Speaker of the House Kennedy and by Commissioner of Highways Gray, to follow legislative mandate in regard to proposed highway construction, and the construction here contemplated was legislatively mandated in 1968. Thus, it is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency. This being true, delegation of the preparation of an EIS to the VHD raises the danger that the EIS will reflect "self-serving assumptions" and brings the case directly within *Greene County*.

The federal defendants argue that the Army Corps of Engineers prepares its own EIS even though it plans, designs and constructs its own projects. However, unlike the VHD, the Army Corps of Engineers is the responsible federal agency for its projects, and whether its statements are more apt to be impartial than the VHD's is immaterial. The VHD's EIS is bound to be "self-serving" in the *Greene County*

sense, and, therefore, delegation to it of the FHWA's duty of preparation is improper. The federal defendants point out that some federal agencies contract with consulting firms to prepare a given EIS; such a case is, however, not before the court.

It is true that the VHD will receive in the ordinary course of events primary system money for Vermont highways whether the particular highway here proposed is built or not but this is immaterial; the VHD will want to see that money spent where the Vermont legislature wants it spent, and to that extent the VHD is necessarily an advocate of the particular project. Required as the court is to reach this holding it is unnecessary to determine whether highway trust funds—state or federal—are in and of themselves necessarily inconsistent with NEPA since they involve by definition an advance commitment of vast sums of money to highway-building—somewhere, sometime—with its many attendant impacts on the environment.

The federal defendants go on to argue, nevertheless, that the FHWA is simply a funding agency which does not plan, construct, design or license highways, so that the state highway departments are the real initial decision-makers. But the "major federal action" [NEPA § 102(2)(C)] we are talking about here is the commitment of federal money—several million dollars' worth—to the building of a highway within a state or states, and the real decisionmaker on whether such action should be taken is the FHWA.

Moreover, the FHWA approves the commitment of federal funds only when the highway proposed by the state(s) meets federal criteria. NEPA has now mandated that those criteria include the environmental considerations which NEPA sets forth. The detailed environmental impact statement must as § 102(2)(C) of the Act itself says and *Greene County* explicates, " 'accompany the proposal through the existing agency review processes.' " 455 F.2d at 421. Here we have the FHWA not only letting the VHD do the draft and final EIS preparatory work, but when the work reached final draft stage, the comments on it by the reviewing board were merely perfunctory, the equivalent of an agency rubber stamp. It is argued that this is the only practicable way for the federal agency to handle EIS preparations, since the individual state departments have hundreds of employees while the federal agency has—at least in its Montpelier office—only 14. This is, however, an argument to take to Congress, seeking either more funds for the conduct of the federal agency operations, a change in NEPA to permit such delegation, or the simple authority to use its existing funds in the preliminary exploration of environmental impacts at the early stages of federal-state highway planning.

The final point intimated if not argued by the federal defendants on this issue is that the specific steps taken by them during preparation of the EIS by the state including communication, consultation and the field trip, when coupled with the regional review, do for all practical purposes amount to "preparation" by the responsible federal agency. According to the testimony of defendant Kelley, however, the Highway Department planning section prepared the EIS in accordance with PPM 90-1. There is no indication whatsoever that the FHWA or any of its employees conceived, wrote or even edited any section of or passage in the EIS. At the most there were informal chats touching upon the subject, together with the aforementioned field trip and subsequent "review." Perhaps this is the most practicable or feasible method of handling the preparation of an EIS under present federal and state highway agency procedures. But it is not what is required by NEPA, the purpose of which is to ensure that the *federal agency making the decision* consider environmental values, potential alternatives and the overall consequences of the proposed action.

To require genuine FHWA preparation of an EIS will obviously in this instance cause delay and, the court was advised by the testimony of Commissioner Gray, additional expense in connection with the construction, for which costs continue to inflate. But as the Court of Appeals for the District of Columbia said in the landmark Calvert Cliffs' Coordinating Committee v. AEC, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1128 (D.C. Cir. 1971), as quoted in *Greene County, supra*, 455 F.2d at 423, "It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible."

II. *Whether the EIS as filed was sufficient under NEPA.*

Assuming that the section of road referred to in the EIS (from Bennington to Manchester) is all that was required to be considered, plaintiffs argue that the EIS is insufficient in a number of respects: (1) that it is biased, as prepared by the VHD, as discussed under Point I above; (2) that it omits any reference to certain areas "of significant environmental sensitivity and considerable intrinsic value," including certain groundwater recharge areas crossed by the proposed corridor, vegetation patterns on the Fayville Branch of the Battenkill River, the peculiar nature of the vegetation in the Chiselville Beaver Pond and the unusual character of a hemlock glen on the westernmost edge of the Lye Brook area; (3) that it fails sufficiently to consider alternatives including improvement to existing Route 7; and (4) that it fails properly to weigh cost and benefits from the proposed federal action.

This court must review the agency decision to see that not only the procedural requirements of NEPA have been complied with, but also that the substantive result of the agency's decision is consistent with a "good faith" weighing of the environmental impact of the project. Conservation Council of North Carolina v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 298 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1973). In other words,

> District Courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA.
>
> The review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors.

Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 353 (8th Cir. 1972).

To meet the "good faith consideration" test, Environmental Defense Fund, Inc. v. Corps of Engineers, *supra*, 470 F.2d at 300, the agency must show that it has adequately weighed the relevant environmental factors in deciding whether and how to go forward with the project. The agency itself need not show "subjective impartiality," *i. e.*, it can have (indeed as discussed below generally does have) a mandate to achieve certain goals which conflict with the preservation of the environment. Environmental Defense Fund, Inc. v. Corps of Engineers, *supra*, 470 F.2d at 295. In the case of the FHWA and the VHD, that goal is, of course, to build highways. But it must be demonstrated by the agency that with regard to the *specific* project for which the EIS is prepared, the agency has weighed with "good faith consideration" the environmental impact of the project and that the agency will modify or drop the project if

the environmental costs are sufficient to outweigh the benefits of the project.

1. There is inherent bias in the EIS here in issue in favor of the proposed highway construction and in derogation of environmental considerations since the VHD is charged with the duty of carrying out a legislative mandate as indicated above. This bias is evident in the rhapsodic prose of the Introduction to the EIS, incorporated herein by reference and attached as Appendix A. At the same time, with one exception noted below and discussed under Point IV, the body of the EIS evidences good faith consideration of the environmental values involved insofar as they relate to the particular segment of road contemplated. If preparation of the EIS by the VHD is found proper by an appellate court, contrary to this court's opinion that the *Greene County* case applies, then this court finds the EIS in substance not to have been biased. That is to say, the EIS demonstrates "good faith consideration," though not "subjective impartiality," and the elaborate Introduction may be treated as so much surplusage.

2. Examination of a 1972 Land Capability Plan of the State Planning Office furnished to the court by stipulation after the hearing and marked hereby as Court Exhibit 2 indicates that two possible gravel aquifer recharge areas and one probable bedrock aquifer recharge area are in the line of proposed construction. There was testimony that salt pollution occurring in connection with winter road maintenance can have significant adverse impact upon such

aquifer recharge areas. There is no direct comment in the EIS in respect to salt pollution in these specific recharge areas, although the EIS does discuss generally the salt pollution problem (p. 43).[2] A botanist also testified as to the rather unique diversity of flora along the Fayville Branch and in the vicinity of the Chiselvill Beaver Pond, as well as to an unusual hemlock glen near the Lye Brook area. The last was commented upon in the EIS as follows:

> The botanical significance of the area, because it represents both hardwood and softwood wetland, is not clearly evident, nor is the rarity of

[2] Research indicates, however, that the major area of salt ion concentration is a narrow band 20 to 30 feet wide along the edge of the highway pavement. As far as the subject project is concerned, this primary salt concentration area would be within the highway right-of-way and would not generally extend to landscaped areas adjacent to the pavement. In selecting trees and shrubbery for landscaping care would be taken to insure that salt resistent [sic] species were used.

Testing of the soil and water supplies adjacent to highways indicates that outside the primary band of influence, salt ion concentration is generally under 250 PPM, which is the limit set for drinkable water by the United States Public Health Service. Since the several public and private water supplies in the project corridor are located upwards of 0.3 mile from the highway location, no adverse effects are anticipated from movement of salt ions through the ground.

Environmental damage resulting from salt ion concentration in streams of rivers, either leached out of the soil from storm runoff or carried directly by melting snow, is equally unanticipated. Samplings from watercourses in Vermont and elsewhere indicates that the sheer volume of water involved reduces the soil ion concentrations to very low levels.

EIS at 43 (footnote omitted).

> such a combination. Almost any interface of divergent natural conditions provides a fascinating study area and wetlands especially are rich in plant forms, insectivore, etc. The proposed highway, however, does not intrude on the central marsh area. Naturalists, game biologists and the forester who investigated the proposed alignment did not find anything they considered unique, rare or especially noteworthy in any way that would be disturbed by construction.

EIS at 52.

By implication the EIS may be said similarly to find unimportant the degree of flora diversity along the Fayville Branch. Finally, Harrington's Cobble, referred to in the opinion and order accompanying the original injunction on June 2, 1972, *see* 343 F. Supp. at 767, is specifically discussed on Pages 47-51 of the EIS and in a letter dated May 21, 1972, of Mr. Mold and Mr. Horsford, a nurseryman, reprinted as Exhibit M to the EIS. (That discussion and letter, as is the entire EIS, are hereby incorporated in this opinion by reference.) The essence of the consultants' findings is contained in the following paragraph:

> A considerable number of plant forms were observed. Many common varieties were profuse. A few were of less general distribution but would be considered as common locally. Still fewer are less well distributed as to be described as common but it was the consensus of the two specialists that *nothing* they found could be classified as rare or unique and *all* could certainly

> be expected to occur nearby outside the proposed construction area.

EIS at 49 (emphasis original). The EIS goes on to say:

> Initial two lane construction will not disturb Harrington Cobble. With future four lane construction, proper slopes and slope control methods will be employed to insure that construction limits will not infringe on this scenic area. Wild plants that exist there will continue to flourish.

EIS at 49-50.

The court finds specifically that there was a good faith attempt to consider the areas of environmental sensitivity and considerable intrinsic value lying along the proposed construction (exclusive of the Lye Brook backwoods area, to be discussed below in Point III), and that, while an individual botanist or federal judge might have concluded otherwise, there has been no abuse of discretion in this respect; this court cannot say the agency's decision to proceed with construction was "arbitrary or clearly gave insufficient weight to environmental factors." Conservation Council of North Carolina v. Froehlke, *supra*, 473 F.2d at 665; Environmental Defense Fund, Inc. v. Froehlke, *supra*, 473 F.2d at 353.

3. Mention is made of the various alternatives to the proposed action, including doing nothing (not considered feasible owing to the insufficiency of the present highway in safety and other features) (EIS at 5), upgrading of existing Route 7, other align-

ments and meeting traffic demands through common carrier (bus or rail) means. These alternatives are summarized at Pages 5 and 6 and Pages 65-71 of the EIS, and the court finds that there was a good faith attempt to consider the alternatives and that the determinations of the EIS in this respect are supported by substantial evidence. The only alternative on which evidence was presented was in reference to improvement of existing Route 7, as to which plaintiffs produced evidence by Robert L. Morris, a traffic engineer and transportation planner, on the basis of which the court finds that projections for traffic through 1995 can be handled on a new two-lane road. The court finds, however, that the view of the EIS that reconstruction of the present Route 7 is not feasible is supported by substantial evidence, in that the present Route 7 proceeds through the center of several towns and villages and such reconstruction would not meet current highway design standards. To the extent that the EIS here relates to two-lane construction only, it is, subject to the exceptions above and below set forth, found to be sufficient. Before an additional two lanes may be built, however, a new EIS must be filed, the court finding specifically that the EIS is insufficient to support four-lane construction, within the reasonably foreseeable future since no present need therefor is demonstrated.

4. An analysis of costs and benefits is required by 42 U.S.C. § 4332(2)(C) (iv) and (v). "The complete impact statement must contain more than a catalog of environmental facts, however. The agency

must also 'explicate fully its course of inquiry, its analysis and its reasoning.'" Environmental Defense Fund, Inc. v. Froehlke, *supra*, 473 F.2d at 351 (citations omitted). *Cf.* Calvert Cliffs' Coordinating Committee v. AEC, *supra*, 449 F.2d at 1114. *See generally* Note, Evolving Judicial Standards under the Environmental Policy Act and the Challenge of the Alaska Pipeline, 81 Yale L.J. 1592, 1600 (1972). The EIS refers to benefits by "economic gain," by increasing opportunities for people to enjoy the beauty and uniqueness of the environment through greater accessibility to it, and by safety to the public. The court finds that the EIS prediction of "economic gain" to the area by providing for fast, safe and efficient transportation "*through* this important economic corridor" (emphasis supplied) is not supported by the evidence; there is no showing that any greater number of travelers will stop to patronize local business than do now—indeed, there is every reason to suppose that fewer of them will do so, since they will more speedily pass "through" this corridor. To the extent that the availability of this highway will promote business, industry, vacation homes, or additional population growth in the area of the highway, there is no indication whatsoever in the EIS that such growth will be of economic benefit or will constitute economic gain to the area. The proposed construction is of limited access, and there is no showing that it will increase opportunities for people to enjoy the environment except to the extent that automobile passengers may view scenery at relatively high

rates of speed or certain areas off of interchange points may be made slightly more accessible timewise to tourists or visitors from Vermont, other states or Canada. The court finds, however, that the safety conclusions of the EIS are supported by substantial evidence; the EIS indicates that 90 per cent of the present highway is in the bad to poor safety category.

The Introduction to the EIS which is attached hereto in its entirely [sic] as Appendix A does represent a weighing of benefits and losses on the basis of which all highway construction through any area could be justified. These are in many ways legislative considerations which a Vermont legislature might conceivably answer differently in 1973 than it did in 1968 when it adopted No. 379 of the Acts of 1967 Adjourned Session, authorizing the proposed construction. It may be noted, however, that the Vermont legislature has taken steps to regulate economic or population growth in ways other than by calling a halt to highway construction, *e. g.*, by adoption of Act 250, 10 V.S.A. § 6001 et seq. (Supp. 1971), regulating land development and permitting local zoning, etc., *see* Walter, The Law of the Land: Development Legislation in Maine and Vermont, 23 Me.L.Rev. 315 (1971), or of Vt.Stat.Anno., Act No. 81 (1973), authorizing capital gains taxes on land sales. Since remand is required for findings to be made by the responsible federal agency, however, a more specific weighing of costs and benefits should ensue, the present EIS containing no reference, for example, to the cost of the highway, and no attempt

to place a dollar figure on economic and environmental harm and benefit caused by the highway. Note, Evolving Judicial Standards, *supra*, 81 Yale L.J. at 1600-01.

III. *Whether the Bennington to Manchester segment of highway is part of a larger proposal for an improved Route 7 or "superhighway" in Connecticut, Massachusetts and Vermont so as to require an EIS for the entire length of Route 7, rather than merely for the particular segment here covered.*

Considerable testimony was presented by the defendants from both federal and state highway officials from each of the three involved states that there is no overall plan for the development of Route 7 into a four-lane expressway or superhighway from Norwalk, Connecticut, to Burlington, Vermont. At the same time there is considerable evidence that each of the three states is contemplating or has already constructed an expressway in a number of segments along the Route 7 corridor. In Vermont a Wallingford to Rutland segment has been built, the Bennington-Manchester section and the Wallingford By-Pass are presently planned or programmed, but the segment from Rutland to Burlington is only under study. In Massachusetts except for the Route 7 By-Pass all proposals for Route 7 improvement are temporarily suspended until a regional transportation study is developed by the Berkshire County Regional Planning Commission, but such proposals have been made. In Connecticut there are no major improvement sections planned north of New Milford,

some 40 miles from the Massachusetts border, but south of New Milford construction or planning is in process. *See* Committee to Stop Route 7 v. Volpe, 346 F.Supp. 731 (D.Conn. 1972). The court finds that there is no overall federal plan for improvement of the Route 7 corridor in the three states into a divided limited access superhighway. The court finds, however, that each of the three states' highway departments are looking toward this end as possible of accomplishment with legislative and federal approval over a long-range period of time, with federal approval taking place on an ad hoc basis at the division engineer level.[3] The court finds, moreover, on the basis of the testimony of Mr. Morris that the construction of isolated sections along the corridor will induce traffic, tending further to require additional construction beyond presently planned termini. The court further finds that federal highway officials have knowledge of the overall planning process by state officials and to a considerable extent work in "partnership" with state officials in connection therewith, and that each of the three states has from time to time taken advantage of federal highway planning money specifically in connection with Route 7 improvement.

The question then becomes whether under NEPA and the Intergovernmental Cooperation Act, 42 U.S.C. § 4231, an overall EIS may be required at any time, or whether particular segments of a high-

[3] The FHWA Vermont division engineer, Mr. Kelley, testified that "We are not dictators, we are salesmen." One may inquire what it is he is "selling."

way may be constructed with an EIS required only as to those segments. This question is plainly one which goes right to the essence of the traditional federal-state highway planning process. It is not unlike, though of considerably less importance on an individual superhighway basis, the question before the United States Court of Appeals for the District of Columbia in the recent breeder-reactor case, Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 No. 72-1331 (D.C. Cir., June 12, 1973). There the court recognized that the liquid metal fast breeder reactor program was still in the research and development stage and no specific implementing action which would significantly affect the environment had yet been taken. Nevertheless, it required a detailed NEPA statement in view of the magnitude of the ongoing federal investment in the program, the controversial environmental effects attendant upon future use of breeder reactors, the accelerated pace under which the program has been moving from research to practical implementation, and the manner in which the investment is likely to restrict future alternatives. NEPA itself requires recognition of the "long-range character of environmental problems . . . ." 42 U.S.C. § 4332(2)(E). So, too, the Senate Report indicates that NEPA was designed to prevent the making of "[i]mportant decisions concerning the use and shape of man's future environment . . . in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S.Rep. No. 91-296,

91st Cong., 1st Sess. 5 (1969), quoted in Scientists' Institute for Public Information v. AEC, *supra*, 481 F.2d at 1090. Seeking to implement the Act, the Council on Environmental Quality (CEQ) has indicated that in certain instances "broad program statements will be appropriate, assessing . . . the overall impact of a . . . chain of contemplated projects . . . ." Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements, 3 Env. L.Rep. 82, 87 (1972). Where "irreversible and irretrievable commitments of resources," 42 U.S.C. § 4332(2)(C)(v), have been made in constructing major segments of an expressway along the line of an existing highway route, subsequent NEPA statements for particular segments become, in the words of Calvert Cliffs' Coordinating Committee v. AEC, *supra*, a "hollow exercise." 449 F.2d at 1128. Cf. Sierra Club v. Froehlke, 359 F.Supp. 1289 (S.D. Tex., Feb. 16, 1973) (EIS for Wallisville Reservoir as part of Trinity River project insufficient; EIS for entire project required). "Super-highways" were cited on the list of modern phenomena threatening the environment as to which legislation had been introduced that was drawn on during the consideration of NEPA. *See* 115 Cong.Rec. 29068 & n. 5 (1969) (statement of Sen. Jackson). An EIS may be of importance, moreover, not just to the decision-makers within the state highway departments and the federal highway bureaucracy, Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972), but also to the Congress and the

individual state legislatures as well as the public, a purpose of NEPA not to be overlooked. *Cf.* National Resources Defense Council, Inc. v. Morton, 148 U.S. App.D.C. 5, 458 F.2d 827, 833 (1972); Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App.D.C. 380, 463 F.2d 783 (1971). *See also* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1973); Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990, 93 S.Ct. 313, 34 L.Ed.2d 256 (1972).

Of course an overall EIS for all of Route 7 would have one major consideration in mind, whether a superhighway is environmentally and otherwise the most viable alternative. Since the very agency which would be considering this derives its funds from highway tax money and is committed to the development of "long-range highway plans and programs" under its enabling legislation, 23 U.S.C. § 134(a), however, one would suppose that the ultimate EIS may not be as objectively formulated as might be hoped for. Indeed, one would go so far as to suggest that perhaps the very existence of so-called highway "trust funds," usable only for highway construction and not other forms of mass transportation is in a very fundamental sense inconsistent with the NEPA requirements that other alternatives be considered. 42 U.S.C. § 4332(2)(C)(iii). Be this as it may, we have to deal with the here and now, and here we are once again with environmental consideration entrust-

ed to departments with promotional aims.[4] *Cf.* Morningside Renewal Council, Inc. v. AEC, 482 F.2d 234, at 239 (2d Cir., 1973), (dissenting opinion).

On the basis of the court's findings of fact and conclusions of law above set forth, the court would attach a condition to proceeding under the present EIS (if that is permitted by any final order of court) in respect to the Bennington-Manchester segment and the construction of two lanes thereof (hereby expressly found to be needed for local purposes) the filing of an overall EIS by the FHWA in respect to the entire Route 7 corridor within one year from any such final order of court. If this opinion is sustained on appeal, then the FHWA must make an overall impact statement within six months from issuance of the EIS ordered in Section I above. This order is made independently on the additional basis of the requirement of the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231 et seq., that "All

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[4] *See* Developments in Environmental Law, 3 E.L.R. 50001, 50008 (1973):

> . . . for the most part the agencies which must do the "full good faith" balancing of economic and social costs against environmental costs are generally structured to be advocates for economic expansion. As long as agencies are left to do the balancing, and as long as they have a *dual mandate* of environmental protection and economic development in their paticular field—for example, power growth for the FPC, nuclear development for the AEC, or flood containment for the Army Corps of Engineers—is not the environment *bound* to come out on the short end?

(Emphasis original.)

viewpoints—national, *regional*, State, and local—shall, to the extent possible, be fully considered and taken into account in planning Federal or federally assisted development programs and projects." 42 U.S.C. § 4231(b) (emphasis supplied).

IV. *Whether there has been compliance with § 4 (f) of the DOT Act of 1966, 49 U.S.C. § 1653(f) and 23 U.S.C. § 138.*

Section 4(f) declares it a national policy that special effort shall be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges and historic sites. After August 23, 1968, the Secretary of Transportation "shall not approve" any project which requires the use of any publicly owned land from such an area if "of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof" unless there is "no feasible and prudent alternative" and there is all possible planning to "minimize harm."

A substantial section of the Green Mountain National Forest, an area known as the Lye Brook Backwoods Area, lies in Bennington County easterly of Arlington and Manchester. This area of about 11,000 acres is, according to the United States Forest Service Multiple Use Management Plan of February, 1971, "a remote area with no permanent roads and includes Bourne Pond and a portion of the Appalachian Trail." Plaintiff's Ex. 32. "It is," according to the same exhibit, "a special area set aside for

those seeking solitude" and is "a place where one can get away in a near natural forest environment to enjoy nature." Legislation was introduced by Vermont's senior Senator and others to declare this a Wild Area, and on October 13, 1972, the Regional Forester advised the Forest Supervisor of the Green Mountain National Forest to place the Lye Brook Backwoods Area "in a 'no development' status" until the outcome of the pending legislation is determined. Plaintiff's Ex. 36. As late as March 7, 1973, the Forest Supervisor indicated that he did not know whether the proposed Route 7 project would actually enter or cross any National Forest land, although he indicated that it may cross a very small portion of this land along the westernmost boundary of it. Plaintiff's Ex. 37.

On the other hand, the EIS contains in Exhibit P letters from the Vermont National Forest Supervisor to the VHD dated December 23, 1970, February 11, 1971, and May 15, 1972, that these lands were for timber production, watershed protection and related activities and that there were as of December 23, 1970, "no recreational facilities contemplated." The Forest Supervisor, Floyd Marita, testified that his office had developed a plan which would locate the western boundary of the wilderness area at the eastern boundary of the proposed highway. To date there has been no determination pursuant to § 4(f) by the National Forest Service. Despite the large amount of acreage in the Lye Brook Backwoods area, such a determination the court rules necessary, regardless

whether the western boundary of that area is ultimately fixed administratively or legislatively to be coincident with the easterly boundary of the proposed highway project. As the Ninth Circuit said in Brooks v. Volpe, 460 F.2d 1193, 1194 (9th Cir. 1972), construing the word "use" in the complementary § 18 (a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138: "The word 'use' is to be construed broadly in favor of environmental statements in cases in which environmental impact appears to be a substantial question. [Cases cited.] Application of this principle in the present case requires that the encirclement of the Denny Creek Campground by the challenged freeway be recognized as a 'use' of that campground . . . ." So, too, the bordering of the Lye Brook Backwoods Area by a highway would constitute the "use" of that land within the prohibitory meaning of § 4(f) as well as a "use" within the Federal Aid Highway Act of 1968 relied upon by the Ninth Circuit above, which is in the same language and statutorily complementary to § 4(f). Since a new EIS is ordered in any event, there should be ample time and opportunity to pursue all § 4(f) procedures.

It is ordered that the injunction issued on October 26, 1972, be and it is hereby continued in effect pending receipt of a sufficient environmental impact statement prepared by the responsible federal agency, to wit, the FHWA.

APPENDIX A

INTRODUCTION

This is the first Environmental Impact Statement to be prepared for a highway project of major proportions in Vermont.

In its presentation, and in the belief that there will be more such statements developed in the near future, the authors wish to present for consideration, especially to those for whom this represents an initial contact with the state, some general comments which might be construed as peripheral to the normal scope of an environmental impact statement.

Many of these facts and issues will be found in only slightly altered form and detail, at the core of almost every E.I.S. prepared concerning Vermont highways.

The environmental issues raised, particularly, are going to be raised again in other areas because of the marked similarity of terrain and socio-economic pattern that has evolved throughout most of the state.

Vermont encompasses 9,609 square miles of essentially rugged to mountainous terrain. At the time of the Civil War the population was just over 300 thousand individuals, quite generally distributed over the entire area excepting the highest mountain ranges. These people lived on family subsistence farms, a type of farm almost unheard of today. Their entire existence was scratched tenaciously from the boulder strewn soil and land was valuable primarily when something could be grown on it, taken

from it, or cattle or sheep could be grazed upon it. If the Vermont Farmer had a beautiful view from his west mowing of the hazy river valley and the mountains beyond, he scarcely had time to notice or enjoy it because he labored almost constantly through the daylight hours of the short summers to provide for "his own".

At that time the State was scarcely 30% forested, the lowlands having been cleared for agricultural activity and the upper slopes through lumbering operations and the manufacture of lye and charcoal. Many old photos of Vermont communities show these denuded hills. Deer, bear, beaver and some lesser forms of wildlife were on the verge of extinction from relentless pursuit for their meat or hides. However, from the decade preceding the turn of the century through World War I and the "Roaring 20's" a younger generation which sought better things in life than the isolation and privation of the "old place", began a seemingly inexorable migration out of the hills, many away from the state altogether. Indeed, in 1860 98% of Vermonters lived rurally. By the late 1930's that figure had declined to 65.7%. This mass exodus of over 30% of the population from rural countryside to urban area had a profound effect on the appearance of the terrain. Farm after countless farm followed in death the faithful hands that had cultivated it. The forests, always ready to reinvade in the absence of mower or cultivator, crept across pasture, then meadow, finally to bury decaying house and barn in tangles of foilage. Wildlife

species, with management and exposed to an abundance of new cover, again flourished. Now, in the 1970's a State once 60-odd percent open has become 70-odd percent forested and though the population has grown to almost 445,000 (somewhat less than the City of Denver, Colorado) it still has the third from lowest population of any state in the nation (statistical density of 21.6 persons per square mile). The comparatively few surviving farms are now dairy or fruit producers and the economy has swung strongly toward tourism. Along with moderate commercial and light industrial activity, financial interests from outside the State have created ski areas on many of the peaks, while lodges, condominiums and seasonal dwellings sprout around their bases. The old farmsteads, so recently abandoned by their sons and daughters are now being eagerly sought by strangers, not as farms but for homes. Developers are riding a tide of retirees and escapees from the large cities who have suddenly discovered that these seemingly endless cool green valleys offer quiet and solace and may, perchance, be one of the last bastions of the individualist, the really free man.

The foregoing is intended to illustrate two things; one, the unique combination of heritage and present activity that has created the Vermont of the 1970's and two, that our natural environment has changed radically in the past seventy years, is changing every day and, in all likelihood, will continue to change again as radically in the next half hundred years. In this respect, we have neither inherited an untarn-

ished environment, unchanged and unchanging, from ages past, nor are we destined to pass it on unmarked by our own needs and use.

No argument here with the naturalist who rushes to defend his wetland and wood; no argument with the barrister who decries the visual and emotional hurt of his client at the hands of "progress"; no argument with those who seek to cherish and conserve the incredible beauty which they so recently have discovered.

This, is the very heart and core of the whole problem. Vermont is beautiful, breathtakingly so at all seasons and in all her guises. Scarcely an acre exists anywhere in the whole state which could not be described as encompassing some intrinsic beauty.

As for the highway project in question, the whole point is that there is no other "more acceptable" alignment somewhere else for a location of this needed and required highway. The very narrow Vermont valley through which the corridor is forced to run possesses every bit the beauty, the flora, the fauna on its western slopes as on its eastern slopes. Every man has his special site, his favorite stream or his quiet forest glade. Unfortunately, there is no alignment, east or west, which can possibly avoid all those things held in individual high esteem by our citizens. If the easterly side is spared, then the westerly side is not—one group of distressed individuals traded for another.

So many people, abraded raw from years of an urban existence, upon acquiring proprietorship and

citizenship in this rural atmosphere have also acquired a strongly defensive and protective attitude toward their new surroundings (and rightly so). Nevertheless, Vermont has a tradition of accommodating the newcomer. Except for the elements, the State has always offered a politely reserved hospitality. Are we now about to erect a portcullis at every entrance? Are we to refuse tens and tens of uncounted thousands of visitors and residents alike the amenity of decent automotive transportation? Are we to continue to subject ourselves and our guests to a witless spectre of carnage of our deficient highways tantamount to deliberate murder?

The real issue is not "does a better line exist", it is, "will the highway be built at all."

Only a little over one percent of the State's total area is presently dedicated to highway purposes. That includes all city and village streets and all town highways, as well as the entire State Highway System. And of the fourteen counties in the State, Bennington County is second only to Essex in having the lowest highway mileage per square mile of area. The additional mileage contemplated would change that value only an imperceptible fraction. From its centerline the highway naturally bulks large in perspective, but from several hundred feet away this highway would be visually lost in the woods.

In the construction of 320 miles of interstate highway from Vermont-Massachusetts Border up the Connecticut River, across Central Vermont, and

northerly through the Champlain Valley to the Canadian Line through some of the most incredibly spectacular scenery, natural areas, rural and urban settings, the equal of, in every respect, the Bennington area, no one has come forth to decry any resulting overwhelming damage, irreversible commitment of resources, destruction of unique or fragile areas, or the like. This is not to say that there has been no damage at all, but it does seem to verify that degradation of the human or natural environment is not a serious or significant problem attending highway construction through rural or remote areas. The overwhelming benefits have been recognized by almost everyone familiar with the old route.

If an alternative exists it is basically the alternative of sacrificing the explicitly human environment (homes, businesses, community values, etc.) which are strongly polarized along the existing US 7 corridor as opposed to minimal use of the natural or remote areas which closely border it on both sides.

Twenty-two million people live in a belt approximately 50 miles wide stretching along the Atlantic Coast from the northerly limits of the greater Boston metropolitan area to central New Jersey. As the ravenous demands of urbanization consume the already meager reserves of open space in that belt, that mass of humanity is going to be forced further and further afield in ever increasing numbers in recreational pursuits and for part time and full time living accommodations. Either we plan and build our transportation system now to accommodate this

increase or we shall face greater congestion in the future. Vermont may well, like it or not, become the one major four season recreational and rural living center for the entire northeast. The natural and scenic areas, the Beaver Meadows and all the rest hanging in the balance which the public needs so desperately today, may well have been quietly nibbled away by private interests. As a matter of precise fact, to demonstrate this point, a commercial housing development is presently underway immediately adjacent to the northern perimeter of the Beaver Meadows flowage. More harm to the sanctuary of beaver dams and unique surroundings may generate from this activity than from any highway project.

All of the areas over which objections have been raised, except for a few acres of Green Mountain National Forest, are presently on private property and subject to the decision of the owner. Only the Fayville Branch reasonably could be forever saved for public appreciation since it is within the National Forest authorized acquisition area. But the "Cobbles" and the beaver dams are someone's "backyard" and, delightful as they may be to any hiker, naturalist, or whomever, there is presently no actual legal public access to them, nor any indication that such is likely. This in no way is to detract from their sundry values but the denial of a partial use of them for highway purposes, under the cloak that this will, in some way, preserve them for future generations is not believed to be an entirely valid line of reasoning.

However, that state of our present biota that the uninitiated or casual observer sees, and interprets as a static condition, something to be grasped and preserved for all time is, in a broader temporal sense, a most transitory thing. The true naturalist not only sees todays bionemic system but, in addition, easily translates it into yesterday and tomorrow. That Robert Frost saw here a profusion of basil, thyme and columbine, ragwort, mint and others we may most assuredly assume from the content of his measured cadences. That he saw them in exactly the same places that we do, as our romantic nostalgia wants us to believe, is highly unlikely. Nature is a brutal parent and the tender green shoots she so carefully nurtures one day she smothers the next. The kind of trees that are found along the proposed line, their distribution, and their ages all indicate the radical change that has taken place in ground cover and land use just within the last thirty years. The entire area of the cobbles, with the exception of a stand of heavy old sugar maples, was completely open pasture with nothing more than our rank native grasses for cover. Within another thirty years most of the light loving low growth found there now will be shut off from sky by the maturing forest canopy and will disappear, to be replaced by those species which find the humid shade a boon. And is there significance in the loss of the initial invaders? Hardly; they flourish again in their own, reckless profusion of color, shape and smell on the other side of the hill where the loggers worked, down the ridge

where the developer cleared, across the valley where the forest burned, etc.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

73-2629, 73-2715

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December one thousand nine hundred and seventy-four.

Present: HON. LEONARD P. MOORE
HON. ARLIN E. ADAMS
HON. WILLIAM H. MULLIGAN
Circuit Judges

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., BERNARD G. WINSLOW, LEON R. ELDRED, ANTISS H. ELDRED, AND WALLACE E. VAN KEUREN, INDIVIDUALLY AND AS MEMBERS OF THE CONSERVATION SOCIETY OF SOUTHERN VERMONT: LAWRENCE WASCO AND RUTH WASCO: AND THE VERMONT ASSOCIATION OF RAILWAYS PASSENGERS, PLAINTIFFS-APPELLEES

v.

CLAUDE S. BRINEGAR, SECRETARY OF TRANSPORTATION, H. JAMES WALLACE, FRANK A. BALCH, HENRY O. ANGELL, ROBERT S. BIGELOW, AND H. GORDON SMITH, IN THEIR CAPACITIES AS MEMBERS OF THE VERMONT STATE HIGHWAY BOARD, JOHN T. GRAY, COMMISSIONER OF HIGHWAYS, STATE OF VERMONT, DAVID B. KELLY, DIVISION ENGINEER, FEDERAL HIGHWAY ADMINISTRATION, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the District of Vermont

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-1625

TIMOTHY W. SWAIN AND KATHERINE A. SWAIN,
PLAINTIFFS-APPELLANTS

v.

CLAUDE S. BRINEGAR, Secretary of Transportation for the United States, et al., DEFENDANTS-APPELLEES

Appeal from the United States District Court
Southern District of Illinois
Northern Division
No. P 74-CIV-53
Robert D. Morgan, *Judge*

ARGUED OCTOBER 3, 1974—DECIDED APRIL 29, 1975

Before SWYGERT, LAY,* Circuit Judges and GRANT,** Senior District Judge.

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* Circuit Judge Donald P. Lay of the United States Court of Appeals, Eighth Circuit, is sitting by designation.

** Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

SWYGERT, Circuit Judge. Plaintiffs brought this suit to enjoin further action on a segment of a proposed Federal-Aid Highway project in the state of Illinois. They contend that the procedures used in obtaining the approval of the Federal Highway Administration on the proposed freeway were insufficient in law and in violation of the Federal-Aid Highway Act, 23 U.S.C. §§ 101 et seq. and the National Environmental Policy Act [NEPA], 42 U.S.C. §§ 4321 et seq. Specifically, they say that the corridor selection process which took place in 1969 was arbitrary, capricious, and subversive of the legislative policy of full public disclosure and full public participation under the Federal-Aid Highway Act, and that an environmental impact statement [EIS] subsequently submitted in connection with the disputed project was insufficiently detailed under the applicable NEPA standards and illegally delegated to the state highway authorities at the critical drafting stage. They further contend that this suit may be maintained as a class action. On June 3, 1974 the parties consented to a temporary restraining order pending a further hearing on the matter. On June 19, 1974 a consolidated hearing on the merits of the dispute was conducted pursuant to Rule 65 (a) (2) Fed.R.Civ.P. Thereafter the trial judge rendered a decision and order dissolving the restraining order and dismissing the complaint on its merits. *Swain* v. *Brinegar*, 378 F. Supp. 753 (S.D. Ill. 1974). Plaintiffs appeal from that order.

I

In 1967, Wilbur Smith and Associates, consulting engineers, submitted a report entitled "Illinois Highway Needs and Fiscal Study" to the Illinois Department of Public Works and Buildings. The report, commissioned in 1964, presented the "findings of comprehensive studies of highway, road, and street needs and financing for complete modernization of the state and local systems to safely and efficiently serve travel requirements during the twenty years, 1966-1985, inclusive." The Smith Report was essentially a predictive analysis of future highway needs and attendant costs. It was based primarily on an evaluation of economic and demographic characteristics and trends as they existed prior to 1967. The report itself recognized that unforeseen changes were likely to occur during the projected period and therefore recommended that "a comprehensive program be established for continual reappraisal" of highway needs. The report made no reference to environmental considerations such as pollution, energy resources, or preservation of tillable soil; it proceeded on the assumption that the pre-1967 population and economic trends would continue, that families would be accumulating larger and larger amounts of disposable income during the prediction period, that the motor vehicle industry would therefore continue to expand, and that "Illinois' growing dependence on highway transportation and the extensive influence of automobile services on all seg-

ments of industrial activity" would continue unabated.

The report recommended, inter alia, the completion of a "trunk" system of interstate highways and supplemental freeways. This system was designed to connect every Illinois city of over 25,000 population; upon its completion, no part of the state would be more than 30 miles from one of its component routes. As presented in the report, the trunk system included a supplemental freeway connecting the cities of Peoria and Lincoln, Illinois. At the present time, these two cities are connected by Illinois Route 121, a two lane highway. The Smith Report did not include any specific reference to the particular need for the Peoria-Lincoln freeway or any specific discussion of the inadequacies of Route 121 or the possibility of upgrading this existing facility.

In response to the Wilbur Smith Report, location studies were conducted for a supplemental freeway corridor from Lincoln to Peoria. The Lincoln-Peoria proposal, designated FAP 406, was divided into two component projects. The northerly portion of the freeway project, known as the District 4 project, ran from Peoria on the north to a point between Delavan and Hopedale, Illinois on the south. The southerly portion, which is the subject of this suit, ran from this general area south to an interchange with Interstate I-55 [1] just northwest of Lincoln. Prior to

[1] The exact location of the I-55 interchange was not a settled issue at the time of the corridor location studies, since

the submission of any public report or the holding of any public hearings regarding the suit project, a corridor approval was obtained for the District 4 project. At the time of the initial hearing on the suit project, therefore, the location of the southpoint of the District 4 project had been established adjacent to and west of Route 121 at a point east of Delavan and southwest of Hopedale.[2]

A corridor location report for the suit project was submitted to a public hearing on July 2, 1969. The report discussed and compared three proposed alignments for the project.[3] It did not contain detailed figures or facts as to the need for the project,[4]

I-55 was itself in the hearing and design stages at that time. The suit project contemplated two alternative locations for the I-55 terminus, one at the intersection of I-55 and Route 121 and one west of that location a short distance. Two corridor alternatives running west of Route 121 for the suit project would require the westerly interchange at I-55. An alternative corridor running east of Route 121 for the suit project would interchange with I-55 at the Route 121 intersection.

[2] At the present time there is an in-place segment of the District 4 project at the Delevan-Hopedale terminus. All corridors thus far proposed for the suit project have assumed this location to be the logical northern end of the project.

[3] These three alignments differ principally in respect to their locations relative to existing Route 121. Plaintiff Swain owns a farm to the west of Route 121. Alternate A, which was recommended by the report and ultimately chosen as the project corridor, has the effect of severing the Swain property.

[4] The only references to the need for this supplemental freeway project consist of one sentence devoted to the Smith Report and three sentences and a map indicating that existing Route 121 has a "higher than average accident experience."

nor did it consider the alternative of upgrading Illinois Route 121. Discussion of environmental considerations was absolutely minimal and entirely conclusory. While the report did recognize the fact that farmland would be taken out of production, no further evaluation of this fact was made other than the simple recognition that it would happen.

At the corridor public hearing the three proposed alignments were explained to those in attendance. Again, no information was presented as to the need for the freeway other than a reference to the Wilbur Smith Report. Little reference was made to environmental considerations in the initial presentation, and this fact was recognized by several persons who participated in the meeting. When one citizen asked whether the proposed project had necessarily to be a fully controlled-access freeway his question was met with a simple assertion that "the supplemental freeway system is to be completely controlled-access highway." No further explanation or justification was offered. In short, by the time of the submission of the corridor report, the decision to go ahead with the project would seem to have been all but made, and discussion at that point focused mainly on which of the predetermined corridor alignments presented the best alternative.

Plaintiffs contend that this corridor selection process was arbitrary and capricious and in violation

of the Federal-Aid Highway Act, 23 U.S.C. § 128 [5] and PPM 20-8 [6] promulgated thereunder. They say

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[5] In 1969, 23 U.S.C. § 128 provided:

§ 128. Public hearings

(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through any city, town, or village, either incorporated of unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification. Pub. L. 90-495, § 24, Aug. 23, 1968, 82 Stat. 828.

[6] In 1969, PPM 20-8 provided in pertinent part:

1. *Purpose.* The purpose of this PPM is to ensure, to the maximum extent practicable, that highway locations and designs reflect and are consistent with Federal State, and local goals and objectives. The rules, policies, and procedures established by this PPM are intended to afford ful! opportunity for effective public participation in the consideration of highway location and design proposals by highway departments before submission to the Federal Highway Administration for approval. They

provide a medium for free and open discussion and are designed to encourage early and amicable resolution of controversial issues that may arise.

The PPM requires State highway departments to consider fully a wide range of factors in determining highway locations and highway designs. It provides for extensive coordination of proposals with public and private interests. In addition, it provides for a two-hearing procedure designed to give all interested persons an opportunity to become fully acquainted with highway proposals of concern to them and to express their views at those stages of a proposal's development when the flexibility to respond to these views still exists.

. . . .

4. *Definitions.* As used in this PPM

a. A "corridor public hearing" is a public hearing that:

(1) Is held before the route location is approved and before the State highway department is committed to a specific proposal;

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a Federal-aid highway; and

(3) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative highway locations, and the social, economic, and environmental effects of those alternate locations.

. . . .

9. *Consideration of social, economic and environmental effects.* State highway departments shall consider social, economic, and environmental effects before submission of requests for location or design approval, whether or not a public hearing has been held. Consideration of social, economic, and environmental effects shall include an analysis of information submitted to the State highway department in connection with public hearings or in response to the notice of the location or design for which a State highway department intends to request approval. It shall also include consideration of information developed by the State highway department or gained from other contacts with interested persons or groups.

10. *Location and design approval.*

a. This section applies to all requests for location or or design approval whether or not public hearings, or the opportunity for public hearings, are required by this PPM.

b. Each request by a State highway department for approval of a route location or highway design must include a study report containing the following:

(1) Descriptions of the alternatives considered and a discussion of the anticipated social, economic, and environmental effects of the alternatives, pointing out the significant differences and the reasons supporting the proposed location or design. In addition, the report must include an analysis of the relative consistency of the alternatives with the goals and objectives of any urban plan that has been adopted by the community concerned. 34 Fed. Reg. 727 (1969).

It should be noted that no written report was required by 23 U.S.C. § 128, from which this Policy and Procedure Memorandum was derived, until 1970, well after the corridor approval proceedings in this case.

that the corridor report and corridor location hearing were merely *pro forma*, that the public at large was never fully informed of facts which would substantiate the need for the supplemental freeway or justify the selection of the three specific corridor location alternatives presented in the report, and that the public was thus denied the opportunity to have an effective voice in the planning of the freeway project. They further contend that other reasonable alter-

native corridor locations should have been included in the corridor report, that the report should have given full consideration to upgrading Route 121 in some fashion, and that a detailed discussion of possible environmental impacts of each of the alternative actions should have been presented to the public in order to facilitate reasoned consideration of all alternatives by those affected.

While we agree that the corridor report and hearing could have been more extensive than they were, we also agree with the district judge that there is no evidence of bad faith and that the primary purpose of encouraging public input in the planning stages of this project was served. At the outset of the corridor hearing the public was informed of the general design of the proposed freeway and of twenty-three factors which were considered by the responsible state officials relative to possible social, economic, and environmental effects of the project. Included among these factors were employment, recreation, pollution, aesthetics, and conservation. Public input was therefore invited on a broad range of topics. Written objections were solicited as well as recorded oral statements, and several written objections were received from interested persons including plaintiffs.[7]

[7] The Swains presented their objections and suggestions on July 10, 1969, eight days after the corridor location hearing. These objections were made a part of the record of the corridor hearing and were transmitted therewith to the Federal Highway Administration.

A full analysis of the three proposed corridor locations was presented in the corridor report and again at the location hearing. PPM 20-8 does not require more than this, but specifically requires only that the study report describe and discuss the "alternatives considered."[8] Moreover, the record indicates that several options not discussed in the corridor report or at the location hearing, including upgrading of Route 121 and the specific alternatives offered by plaintiffs, were in fact analysed and found less advantageous than the location which was finally adopted. The discussion of environmental considerations, while highly conclusory and somewhat superficial, did indicate that such factors were considered by the Illinois Department of Public Works and Buildings, Division of Highways, and certification of this fact was properly made to the Secretary of Transportation as then required by 23 U.S.C. § 128.

Plaintiffs' real dispute here is with the ultimate selection of alternate A as the corridor to be used in the construction of the freeway. In this regard they make several logical and persuasive arguments favoring some other alignment. After a careful review of the record, however, we are unable to say that the corridor chosen is patently unreasonable or so clearly arbitrary as to justify a reviewing court in substituting its judgment for that of the Federal Highway Administration which approved this cor-

[8] *See* PPM 20-8, § 10 *supra* note 6.

ridor. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1970). Accordingly, we find the corridor selection procedures to have been valid under the law as it existed in 1969 and the ultimate choice of corridor A to be beyond the proper limits of this Court's power of review.[9]

II

Having held that the procedures used in 1969 in selecting the corridor for the southerly portion of FAP 406 were valid under 23 U.S.C. § 128 and PPM 20-8, we come to the more difficult question of whether subsequent enactment of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* requires a re-evaluation of the project, and whether, if NEPA has not been fully complied with, this project must be enjoined until compliance is obtained. For the reasons which follow, we hold that NEPA does require a full review of the suit project, that such a review has not yet been conducted in compliance

[9] This finding does not mean that corridor A will necessarily be used for the project. As we will point out, data disclosed in the environmental impact statement to be prepared by the Federal Highway Administration may well dictate a reopening of the corridor selection process. However, if no such environmental data is developed, the 1969 corridor selection will stand and no new corridor hearings will be required. We believe that this approach fully complies with the command of the National Environmental Policy Act that "public laws of the United States shall be interpreted and administered in accordance with the policies set forth" in that act. 42 U.S.C. § 4332(1). *Cf. Lathan* v. *Brinegar*, 506 F.2d 677, 687-88 (9th Cir. 1974).

with the act, and that further action on this portion of FAP 406 must therefore be enjoined pending a full review and determination by the Federal Highway Administration whether this highway should be built as presently planned.

On January 1, 1970 the National Environmental Policy Act became law.[10] Under the Act, all agencies of the Federal Government are to include in their consideration and development of major federal actions having significant effect on the environment a "detailed statement by the responsible official" on five specific aspects of the proposed action. They are: "i) the environmental impact of the proposed action, ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, iii) alternatives to the proposed action, iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C).

This detailed statement is to be issued only after the "responsible federal official" has obtained input from every federal agency which has "jurisdiction by law or special expertise with respect to any environmental impact involved." *Id.* In addition, comments and views of appropriate state and local agencies are to be solicited and appended to the state-

[10] Pub. L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

ment. Upon its completion, this report is to be "made available to the President, the Council on Environmental Quality and to the public . . . , and [it is to] accompany the proposal through the existing agency review process. . . ." *Id.*

Finally, the Act provides that these provisions shall be applied by all Federal agencies to the "fullest extent possible." 42 U.S.C. § 4332(1). We have previously held that this provision requires evaluation of ongoing projects like the suit project under NEPA:

> The defendants also claim that Section [4332] of NEPA does not apply to Highway 16 because this project was in progress prior to January 1, 1970, the effective date of the Act. Although the Act is not to be given retroactive effect, it does apply, as the defendants recognize, to certain projects "ongoing" when the Act became effective. Considering the Congressional command that the Act be complied with "to the fullest extent possible", an ongoing project is subject to the requirements of Section [4332] until it has reached that stage of completion where the cost of abandoning or altering the proposed project clearly outweigh [sic] the benefits which could flow from compliance with Section [4332] Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, (4th Cir. 1972). Here final federal approval for the project did not occur until over one year after the effective date of the Act. Actual construction was not commenced until almost two years later. Too, the defendants make no claim that they could not have satisfied the procedures outlined in Section [4332]. We hold, therefore, that the issuance of the preliminary injunction did not extend retroactive effect to NEPA. *Scherr* v. *Volpe*, 466 F.2d 1027, 1034-35 (7th Cir. 1972).

See also Barta v. *Brinegar*, 358 F. Supp. 1025 (W.D. Wisc. 1973). Since construction has not commenced on the suit project, it is nowhere near "that stage of completion where the cost of abandoning or altering the proposed project clearly outweighs the benefits which could flow from compliance with Section [4332]." Therefore NEPA requires that an environmental impact statement be prepared for this project prior to any decision to commit federal funds to its completion.

III

On August 16, 1972 a draft environmental impact statement for the suit project was submitted to the Federal Highway Administration by the Illinois Department of Transportation. This draft consisted of approximately forty-six pages of textual material and numerous maps, charts, and pictures. Its organization was patterned after the requirements of NEPA, and each of the five areas specified in that act was accorded a separate section. A close examination of the draft reveals, however, that the report was rather superficial in several key areas.[11] In

[11] In its initial review letter, the United States Department of Interior described the draft EIS as follows:

> The statement itself contains many generalities, is lacking in specific information, and inadequately treats the

fact, this draft EIS, like the corridor location study, seems to have proceeded from the assumption that the freeway would be built and that the only questions remaining to be answered were which precise alignments and design features were to be chosen within the previously selected corridor.

Thus, discussion of the need for the proposed freeway was limited to one page of conclusory statements. No consideration of the alternative of upgrading existing Route 121 was presented beyond a simple recitation that such an alternative existed. The alternative of no new construction whatever dealt with in a single paragraph which relied on "statewide needs studies," presumably referring to the Wilbur Smith Report, though this was never made clear. Alternative alignments were rejected on the basis of the previous corridor selection process, which was conducted prior to the effective date of NEPA.

This draft was circulated to the appropriate federal, state, and local agencies for comment. After the views of these agencies were received, the Illinois Department of Transportation prepared the final EIS. An examination of the final statement indicates little substantive change from the original draft. For example, in response to criticisms and

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natural environmental resources associated with the project.

Letter of November 14, 1972 from Burton H. Atwood, Field Representative for the Secretary of the Interior, to H. W. Monroney, District Engineer, District #6, Illinois Department of Transportation.

suggestions regarding the upgrading of Route 121 by the Illinois Natural History Survey the final draft merely refers back to the elimination of alternatives which took place during the corridor selection process. Similarly, in response to the suggestion by the Environmental Protection Agency that loss of farmland could be considered an adverse effect, the final EIS merely adds two sentences:

> When considering adverse effects, one that should not be overlooked is the loss of over 700 acres of tillable land. This change in land use brings about many side effects that are never fully noted.

There is no indication in the EIS as to what these side effects might be. Thus, in sum and substance the final draft is identical to the original state-prepared draft with a few superficial changes and deletions.

On November 9, 1972 the final EIS was submitted to the public at a design public hearing. At the same time a design location study was also submitted. Discussion at this hearing was generally limited to specific design features, although the inadequacies of existing Route 121 were discussed in some detail from a safety standpoint. On October 23, 1973 design approval for the proposed project was given to the Illinois Department of Transportation.

The district judge held that the final EIS was "sufficiently detailed to satisfy the requirements of NEPA." 378 F. Supp. at 759. His further discus-

sion of the adequacy of the impact statement is instructive:

> Plaintiffs assert that the statement filed for FAP 406 fails to explore in sufficient detail alternatives to the proposed route and that it does not explore certain relevant environmental questions in adequate depth. A number of inquiries are suggested by the plaintiffs which they believe should have been made, including extensive chemical pollution tests, the desirability of alternative modes of transportation, and the effect of the removal of farmland from production on the world hunger problem. While unending study of these matters would, no doubt, be beneficial, the failure of the defendants to conduct such studies and to arrive at conclusions thereon here does not render the impact statement inadequate. These questions have a general significance that extends far beyond the limited project envisoned here. It is simply not feasible to hold up a project such as this pending such studies. It would be grossly impractical to do so. An exhaustive examination of every conceivable minor environmental effect of a given project, even though patently and cumulatively detrimental, is simply not required by NEPA.
>
> Nor does the defendants' failure to reconsider in greater depth the available alternatives to the proposed corridor invalidate the EIS. It is evident that the corridor selection process was reviewed during the preparation of the impact statement, at least partly at the suggestion of the FHWA. At that time the defendants apparently concluded that the selection of the recommended corridor was reasonable and that no new circumstances had arisen in the meantime which justified reopening the matter. This approach is not inconsistent with the mandate of NEPA that the Act be complied with to the "extent possible." See Citizens to Preserve Foster Park v. Volpe, 466 F.2d 991, 997 (CA 7 1972)). *Swain* v. *Brinegar*, 378 F. Supp. 753, 759-60 (S.D. Ill. 1974).

But we believe that one of the fundamental purposes of NEPA is to require consideration of questions of general or broad significance, such as chemical pollution, alternative modes of transportation, and world resource exploitation. The act expressly requires recognition of "the worldwide and long-range character of environmental problems," 42 U.S.C. § 4332(2)(E), and one of the specific elements to be studied in the EIS is "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. 42 U.S.C. § 4332(2)(C). Thus, NEPA is clearly intended to focus concern on the "big picture" relative to environmental problems. It recognizes that each "limited" federal project is part of a large mosaic of thousands of similar projects and that cumulative effects can and must be considered on an ongoing basis.

Furthermore, a simple "review" of the corridor selection process is wholly insufficient as a "detailed" consideration of alternatives to the proposed action under section 4332(2)(C). The corridor selection

process here did not focus on environmental considerations to any significant degree whatever, and at no point in that process was there any evidence of a detailed consideration of comparative environmental impacts of any of the major alternatives. More importantly, by deferring to the earlier corridor selection process, the ultimate question of whether this fifteen mile segment should be built at all was almost entirely overlooked.[12] Clearly, this approach falls far short of fulfilling the basic function of ensuring

> that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. *Calvert Cliffs' Coordinating Comm., Inc.* v. *United States Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

[12] Also overlooked in this approach is the appropriateness of considering the Peoria-Lincoln supplemental freeway in two segments rather than as a single project for purposes of NEPA review. As the Eighth Circuit has observed:

> [I]n order to comply with the spirit and objectives of NEPA . . . to cause a meaningful consideration of environmental effects along with a consideration of alternatives, the minimum length of state highway projects that are supported in part by federal funds must be extended to embrace projects of a nature and length that are supportable by logical termini at each end. *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11, 19 (8th Cir. 1973).

On the face of this record, the logical termini for the FAP 406 project would seem to be the cities to be connected by the freeway: Lincoln and Peoria. There is no apparent "independent utility" in constructing either of the smaller segments, and the mere existence of a boundary line separating arbitrary state highway department districts does not in itself establish a logical terminus. *Id.*

We do not find it necessary, however, to suggest what further discussions or considerations within this particular EIS would be necessary to meet NEPA standards. Rather, we confine ourselves to a more fundamental problem, namely, the delegation of responsibility for researching and drafting the impact statement to the Illinois Department of Transportation. Such a delegation is in direct conflict with the language of section 4332(2)(C). That section clearly addresses itself to the actions of federal agencies and federal officials. In pertinent part, section 4332(2)(C) provides:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

Clearly, it is the federal official who is to make the detailed statement after consultation with other interested federal agencies.[13] Nothing in the act intimates that this central function is to be delegated, and the entire thrust of the act weighs heavily against delegation to local or state officials.[14] Indeed, such a delegation invites the very problems we find reflected in this impact statement.

The National Environmental Policy Act is, as its name suggests, aimed at protecting the environmental health of the nation as a whole as well as that of each of its separate parts. If few areas is the importance of this broad policy as clear as it is in the

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[13] *See* Judge Lay's dissent in *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe*, 487 F.2d 849, 855-58 (8th Cir. 1973).

[14] The district judge misconstrued the nature of NEPA's command relative to the impact statement. He saw its command as merely requiring "the responsible federal official [to] *provide* an EIS." 378 F. Supp. at 760. The language of the Act belies this construction. Under the act the EIS is described as "a detailed statement *by* the responsible official." (emphasis added.) The act goes on to say that "[p]rior to *making* any detailed statement, the responsible Federal official shall consult . . . and obtain . . . comments . . . ." (emphasis added.) Clearly the act contemplates the EIS being prepared by the federal official in the first instance. For this reason PPM 90-1, a procedural memorandum issued by the United States Department of Transportation, and which provides for state preparation of the initial EIS draft, is entitled to scant consideration. Whatever effect an administrative interpretation may have when the command of legislation is in some way ambiguous, when the congressional command is clear, as we believe it to be here, it is simply beyond the power of an administrative agency to alter that command or to avoid its effect. *See, e.g., Social Security Board* v. *Nierotko*, 327 U.S. 358, 368-70, 66 S.Ct. 637, 90 L. Ed. 718 (1946).

area of highway construction, and in particular the area of major interstate and interurban highways. Such highways have a profound influence on "population growth, high density urbanization, industrial expansion, [and] resource exploitation." 42 U.S.C. 4331. While highways of this type are often needed desperately by a population with a real and particular need to travel and expand, it is also true that such highways often create demands for travel and expansion by their very existence.[15] Thus, almost any sponsor of a major four lane highway project can say with some assurance that if the highway is built it will be used and auto travel will be safer, faster, and more efficient because of it. In short, "need" is often a self-fulfilling prophesy in the area of major highway construction.

Moreover, the apparent "need" for such a highway project may well seem the greatest to those closest to it. Certainly it can be predicted that for those whose responsibility it is to propose and construct such highways, the tendency will be to de-

[15] Thus, the Wilbur Smith Report recognizes that

> [w]here conditions are favorable for economic expansion, highways can serve as catalysts.
>
> . . .
>
> The impact of highways on land use is illustrated by the development along the Edens Expressway in Chicago. It is evident that industries have invested large sums in new facilities located on land adjacent to this facility and that plants and population have been attracted to the area where adequate transportation is available.

Illinois Highway Needs and Fiscal Study at p. 35.

velop a dedication or loyalty to projects which have advanced to the public hearing stages or beyond. This can hardly be avoided given human nature. In the present instance, for example, the Lincoln-Peoria project had advanced well beyond the public hearing stages by 1970. In fact, construction had already begun for the northerly segment of that project. Under these circumstances there is at least a grave possibility that the EIS requirement was viewed by the state as merely a procedural hurdle to be contended with in order to complete an ongoing project to which the state had made relatively extensive financial and administrative commitments.[16]

Finally, state agencies simply are not in a position to evaluate environmental consequences of a national or worldwide scope.[17] To require them to do so is to invite substantial duplication of effort and widely varying results.[18] State agencies quite

[16] *See* Comment, *The Preparation of Environmental Impact Statements by State Highway Commissions*, 58 Iowa L. Rev. 1268 (1973), for a thoughtful evaluation of the problems inherent in state preparation of impact statements for major highways projects.

[17] Thus, the district judge believed that "chemical pollution . . . alternative modes of transportation . . . and . . . the world hunger problem . . . have a general significance that extends far beyond the limited project envisioned here." 378 F. Supp. at 760. It is not unlikely that state officials may take the same view. Indeed, it would be entirely logical for them to do so since they have limited access to the kinds of information required to accurately evaluate many of these and similar problems.

[18] Obviously, there is little to recommend a procedure whereby various officials and departments in each of the fifty states

independently research and evaluate such problems. Beyond the duplication of expense, such a procedure is anomalous in light of the policies and goals reflected in § 4331 of the act:

> § 4331. Congressional declaration of national environmental policy
>
> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fullfill the social, economic, and other requirements of present and future generations of Americans.
>
> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources . . . .

If the requirement of an environmental impact statement for major federal actions is designed to further the fullfillment of "the continuing responsibility of the Federal Government to use all practicable means . . . to improve and *coordinate* Federal plans, functions, programs, and resources . . ." (emphasis added), it seems odd that this central function (the EIS) should be delegated to state officials who have little means, motivation, or indeed power to effectively coordinate such federal actions.

properly look first to the interests of their own state; this is inherent in the design of a federal union. And such agencies are subject to political pressures which can often make detached evaluation of their own projects quite difficult. The result is that state drafted impact statements may slight or completely ignore essential national concerns, and these deficiencies may successfully be masked by use of general, nonspecific language within the EIS itself. Once such a delegation process is established, it is not unlikely that the responsible federal agency will accept the original draft with little comment or change as was done here.

This danger must be avoided. It is simply no answer to rely on either the federal agencies to review state-drafted impact statements or on the federal courts to determine the adequacy of this second-hand review.[19] The key to NEPA is that the federal agency must consider and evaluate environmental impacts before it determines whether or not to move ahead on a given project. The decision on the project itself is to be made only after preparation of the draft EIS and solicitation of views and comments from "federal, state and local agencies." By the time

[19] *See Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F.2d 927, 930-34 (2d Cir. 1974); *but see Citizens' Environmental Council* v. *Volpe*, 484 F.2d 870, 873 (10th Cir. 1973), *cert. denied*, 94 S.Ct. 1935 (1974); *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe*, 487 F.2d 849, 853-54 (8th Cir. 1973); *Life of the Land* v. *Brinegar*, 485 F.2d 460, 467-68 (9th Cir. 1973); *cert. denied*, 94 S.Ct. 1979 (1974); *Sierra Club* v. *Lynn*, 502 F.2d 43, 59 (5th Cir. 1974).

a state agency reaches the point when an EIS becomes necessary, its decision can fairly be said to have been made, at least with respect to whether the particular highway should be built.[20] Delegation of the research and drafting of the initial EIS to such an agency therefore precludes that impartial assessment of environmental consequences which lies at the heart of the National Environmental Policy Act.

As the Ninth Circuit has recently pointed out in its *en banc* opinion in *Lathan* v. *Brinegar*, 506 F.2d 677 (9th Cir. 1974),

> NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of ther [sic] decisions when they make them. The procedures required by NEPA, 42 U.S.C. § 4332(2)(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved

[20] In the case of the suit project this predetermination is reflected in the cover letter which accompanied the state-drafted EIS to the Federal Highway Administration:

> Attached for distribution by your office are 18 copies of a draft environmental statement for the portion of Supplemental Freeway FAP Route 406 from Lincoln to the Delavan Junction.
>
> I request that you process the attached statements as quickly as possible to avoid any unnecessary delay in this project.

It seems clear from the tenor of this letter that the EIS was viewed by the state agency as a step along the way in an ongoing project and not as part of the process of determining whether a project should be undertaken in the first instance.

> only if the prescribed procedures are faithfully followed; grudging, *pro forma* compliance will not do. *Id.* at 693.

In this respect we believe the clear requirement that the "responsible federal official" prepare the EIS for all major federal projects must be strictly enforced. Such a construction not only guarantees that the research and preparation of the EIS will be free of the conscious and subconscious effects of self-serving bias, but it will also avoid the necessity of reviewing each delegated impact statement for substantive content and sufficient federal input. It is difficult for a court to determine when federal review amounts to a "rubber stamp" within the context of an apparently "detailed" and often sophisticated impact statement. More importantly, it may be impossible for either a court or a federal agency to tell when some environmental concern peculiar to a given project has been entirely omitted from such a statement. Rigorous adherence to the statutory procedures will substantially avoid these problems.

IV

In Count II of their complaint, plaintiffs seek to bring this action as representatives of two alleged classes of people pursuant to Rule 23, Fed.R.Civ.P. The classes are defined in the complaint as

> (a) all owners and tenants and users of farm land in the State of Illinois who are subject to having farm land they own and farm land from which they make their livelihood condemned for

> the purposes of the construction of public highways, without being afforded fair notice and hearing and afforded the protection of the National Environmental Protection [sic] Act of 1969, and (b) all owners and tenants and users of farm land in the State of Illinois who are subject to having farm land they own and farm land from which they make their livelihood condemned for the purpose of the construction of Federal Aid Route 406 and including those who have already conveyed or agreed to convey their property under threat of condemnation.

A comparison of the two proposed classes with the complaint in this suit indicates that the breadth of these classes outstrips the scope of the complaint and reliefs sought therein. The complaint specifically describes its subject matter as "a segment of a proposed road improvement known as Freeway FAP 406, [which] extends from northwest of Lincoln to approximately 2 miles north of the Delavan junction in Logan and Tazewell Counties, Illinois." It is difficult to see how farmers in areas unaffected by this segment of FAP 406 would have standing to press a claim in this context. Plaintiffs invoke NEPA only insofar as that act "requires that the Defendants protect the environment of the affected farm land" (emphasis added), that is, those farms in the path of one or more of the corridor alignments proposed for this particular project. There is no allegation that persons other than the owners and lessees of these particular farms will be affected by the suit project, and it follows that other farmers

in the State of Illinois lack standing to bring this suit. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

Once the class is limited to those farmers actually threatened by the suit project, two difficulties become apparent. First, as the district court pointed out, there is a necessary antagonism between the plaintiffs and those whose farms might be severed if some alternative corridor location for this project were selected. In addition, there is at least a possibility that some of those who have "already conveyed or agreed to convey their property" will have an interest in the integrity of their bargain with the state, and also oppose any change in the corridor selection for this project. 378 F. Supp. at 756. Thus, the Swains cannot meet the requirement of Rule 23 (a)(4) Fed.R.Civ.P., that they "will fairly and adequately protect the interests of the class." Second, when the class is limited to those whose farms lay in the path of the suit project, it is not at all clear that these people represent a class so numerous that joinder of all members would be impractical. Rule 23(a)(1), Fed.R.Civ.P.

Since there are apparently conflicting interests involved here, and since the owners of properties lying along any of the proposed corridors or along any other reasonable corridor are readily discoverable,[21] we believe that the interests of justice are best served by requiring notice and request for joinder

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[21] It appears from an examination of the record and exhibits on file in this case that this information may be readily obtained from the Illinois Department of Transportation.

rather than determination of a class with an opting-out procedure.

We therefore affirm the dismissal of Count II of the complaint.

V

Because the Federal Highway Administration has failed to conduct an independent, in-depth study of the potential environmental impact of the suit project as required by NEPA, further work on this federally funded highway must cease until such a study is conducted and a proper EIS drafted. This EIS must fully comply with the mandates of NEPA. It must realistically consider all reasonably available alternatives to the proposed project, including no project at all. Analysis of these alternatives must be "detailed" and must reflect meaningful evaluation not only of purely local considerations, but of any significant national or worldwide implications as well.[22] If this study indicates that the project should be built as planned, the review process will recommence with a design public hearing, at which time

[22] We recognize, of course, that no [sic] every project of this type will have national or worldwide implications in and of itself. We do believe, however, that these projects should be viewed and evaluated in context with other similar projects throughout the nation to the extent that such evaluation may provide a basis for judgments as to large scall [sic] environmental priorities. Thus, for instances, while a single freeway project through farmlands may have negligible effect on world or national food problems, a major trend toward construction of many of these projects nation-wide may have definite implications in these or other areas. One of the primary functions of an EIS is the isolation and evaluation of such trends.

the EIS will be made available to those in attendance. If the study indicates that this project should be modified in some significant way, new corridor public hearings may be required to consider locations suggested by the environmental findings therein. Finally, if the study indicates that the environmental costs of this project are prohibitive, federal funds may be withdrawn from this project as the Federal Highway Administration sees fit.

The order of the district court is reversed and the case is remanded to that court with direction to retain jurisdiction pending submission of a proper EIS by the Federal Highway Administration. Upon submission of that EIS, the district court shall make such further order as it deems appropriate consistent with this opinion.

GRANT, Senior District Judge, dissents (opinion to follow).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Argued October 3, 1974

April 29, 1975.

Before
Hon. LUTHER M. SWYGERT, Circuit Judge

No. 74-1625

TIMOTHY W. SWAIN and KATHERINE A. SWAIN,
PLAINTIFFS-APPELLANTS

vs.

CLAUDE S. BRINEGAR, Secretary of Transportation for the United States, et al., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.

No. P 74-CIV-53

Robert D. Morgan, *Judge*

ORDER

IT IS ORDERED that the opinion filed this date shall not be published under Circuit Rule 28 until after Judge Robert A. Grant has filed his written dissent.

APPENDIX F

1. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

* * * *

2. The Guidelines of the Council on Environmental Quality provide in relevant part (40 C.F.R. 1500.7 (c)):

> Where an agency relies on an applicant to submit initial environmental information, the agency should assist the applicant by outlining the types of information required. In all cases, the agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental statements.

3. During the entire period the environmental impact statement was being prepared and this case was pending in the lower courts, the Department of Transportation required local agencies to prepare draft environmental impact statements. This procedure was governed by Federal Highway Administration Policy and Procedure Memorandum (PPM) 90-1. It is published at 37 Federal Register 21809-21816, and was published by the Council on Environmental Quality at 102 Monitor, Vol. 1, No. 9 (October 1971). We set out relevant portions below.

5. *Applications.* a. An environmental statement or combined environmental/section 4(f) statement or negative declaration, whichever is appropriate, shall be prepared and processed in accordance with this memorandum for each highway section proposed for construction with funds administered by the FHWA, including in appropriate cases any section financed from funds transferred to the FHWA from other agencies, which receives or received design approval (see paragraph 5e) on or after February 1, 1971.

b. An environmental statement or combined environmental/section 4(f) statement, whichever is appropriate, shall be prepared and processed in accordance with this memorandum for each highway section which received design approval on or after January 1, 1970, and before February 1, 1971, and which constitutes a major action significantly affecting the environment (see Appendix F, paragraphs 2 and 3) if, in the judgment of the FHWA division

engineer, implementation of the National Environmental Policy Act to the fullest extent possible requires preparation and processing of an environmental statement. In making his judgment the FHWA division engineer should consider, in addition to the written reassessment prepared by the HA (see paragraph 5c) for each such highway section, the status of the design; right-of-way acquisition including demolition of improvements within the right-of-way; number of families already rehoused and those yet to be rehoused; construction scheduling; benefits to accrue from the proposed highway improvement; significant impacts; and measures to minimize any adverse impacts of the highway.

c. Highway sections which received design approval on or after January 1, 1970, and before February 1, 1971, that are classed as a major action are to be reassessed by the HA in consultation with the FHWA division engineer or his representative. The written reassessment should consider if the highway plans were developed in such a manner as to minimize adverse environmental consequences.

* * * *

f. A single environmental statement, or negative declaration, is applicable to jointly planned undertakings between the FHWA and other Federal agencies. The lead agency will be responsible for the appropriate document (i.e. the HA for a proposed highway section that also requires a U.S. Coast Guard action for bridge clearance over navigable water). Highway section proposals submitted for an

FHWA approval shall include a copy of the statement prepared and processed by another Federal agency or reference to such a statement previously furnished to FHWA. A highway section in this category will generally be of the nature where there is no actual transfer of funds to the FHWA and the FHWA acts only in the capacity of a review agency or consultant advisor to the other Federal agency.

* * * *

6. *Procedures* (see Appendixes C and D for a flow chart). The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. Piecemealing proposed highway improvements in separate environmental statements should be avoided. If possible, the highway section should be of substantial length that would normally be included in a multi-year highway improvement program.

a. A proposal to develop or improve a highway section should be coordinated in the early stages with appropriate local, State, and Federal agencies (PPM 20-8 and IM 50-1-70). Initiation of coordination at the beginning of the location study will assist in identifying natural and cultural areas of significance, agency and public concerns, and help in determining the need for and preparation of an environmental statement. Existing coordination mechanisms, such as above cited (public hearings, Office of Management and Budget Circular No. A-95 reviews)

and other established procedures for coordination should be used to the greatest extent practicable.

(1) The information obtained through coordination and the highway studies (technical, engineering, social, economic, and environmental, as appropriate) should be used in making an assessment of the potential environmental impact (both beneficial and detrimental) of the proposed action. This environmental assessment should be accomplished utilizing a systematic, interdisciplinary approach to assure that proper consideration is given to the identification and evaluation of potential environmental impacts. This environmental assessment, performed in consultation with FHWA for all projects, will provide the basis for determining whether an environmental statement will be prepared.

(2) The environmental statement and/or section 4(f) statement may be a part of the study report for the highway location, if desired; however, if included in the study report, the statements are to be consolidated in one place in the report and in a form that can be reproduced separate from the report.

b. A draft environmental statement shall be prepared only for those sections for which the HA or division engineer determine that construction and operation of the highway section will have a significant impact upon the environment. Appendix F lists guidelines to assist in determining significant impacts associated with the construction and operation of a highway. In addition, the HA or FHWA may

wish to consult other local, State and Federal agencies with specific expertise when determining the significance of an impact. The draft environmental impact statements, including section 4(f) information, shall be prepared and circulated by the HA in cooperation with the FHWA during the location study. A representative of the FHWA division office shall indicate his review and adoption of the draft environmental statement by signing and dating before it is released for comment.

c. The draft environmental statement, including necessary section 4(f) information when required, is to be circulated by the HA to the appropriate agencies (see Appendix G) for comment, and made available to the public not later than the first required notice of location public hearing (30 to 40 days before date of hearing) or notice of opportunity for a public hearing as set out in PPM 20-8 (see Appendix H). If the highway section qualifies for exemption from public hearing procedures, a draft environmental statement, if required (including necessary section 4(f) information), is to be prepared and circulated for comment, and made available to the public as early as practicable. Regardless of whether or not there is a public hearing, a notice should be placed in the newspaper advising the public that the draft environmental impact statement is going to be circulated for review and comment. The notice should include information on where the statement is available for review and how copies can be obtained.

(1) The HA shall request a determination of significance from the section 4(f) lands agency and include the letter requesting such determination and the determination, if received, as exhibits to the draft statement.

(2) An additional location or design public hearing will not be required for the sole purpose of presenting and receiving comments on the draft environmental statement for those projects which were processed in accordance with procedures in effect at the time.

(3) The comments received on the draft statement are to be made available at the HA office for public review.

d. The HA shall furnish 17 copies of each draft environmental statement to the FHWA division engineer who shall distribute 16 copies to the following recipients:

FHWA Regional Office	1
FHWA (to the Office of Environmental Policy, HEV-10)	2
DOT's Office of Environment and Urban Systems (TEU)	3
Council on Environmental Quality (CEQ), 722 Jackson Place N.W., Washington, D.C. 20006	10

Note: The HA is to make distribution to all other required local, State, and Federal agencies (see Appendix G).

e. The HA shall announce the availability of and briefly explain the draft environmental statement or negative declaration in its presentation at the location public hearing (or at the highway design hearing when a draft statement is prepared and circulated in conjunction with design studies).

f. The HA may establish a date not less than 30 days from the date of transmittal, plus a normal time for mail to reach and be returned from the recipient, for return of the comments, except 45 days plus mailing time shall be allowed for the Environmental Protection Agency (EPA) to comment. The FHWA division engineer should include a similar time period (30 days plus mailing) for return of comments in his distribution correspondence. If an agency does not respond by the indicated date, the HA may assume the agency had no comments. The HA should endeavor to grant requests for a time extension of up to 15 days for return of comments unless a 45-day review period, plus mailing time, was originally established.

g. Draft environmental statements shall be available for review by the public at the HA headquarters; the State, regional, and metropolitan clearinghouses; the FHWA division, regional, and headquarters offices; and at the appropriate public hearings. The HA and FHWA may charge nongovernmental individuals and organizations for copies of environmental statements in accordance with established fee schedules.

(1) The public and private organizations may also order copies of draft and final environmental statements from the National Technical Information Services, U.S. Department of Commerce (see Appendix I).

* * * *

i. The HA shall prepare a final environmental statement or combined environmental/4(f) statement in consultation with the FHWA for each project for which it prepared and circulated a draft environmental statement following the format in Appendix E. The final statement shall include a copy of all comments received and the consideration and disposition of environmental comments raised at the public hearing and on the draft statement. The correspondence included in the final statement should contain marginal notes indicating where in the statement the comments are treated or discussed (any other suitable method of showing where the comments are discussed is satisfactory).

j. FHWA review and adoption of the final environmental statement shall be the responsibility of the Regional Federal Highway Administrator. The Regional Federal Highway Administrator shall indicate his adoption by signature thereon, and forward 15 signed copies of the final statement to the Office of Environmental Policy, HEV-10. A copy of a signed statement may also be returned to the originating office. The HA and FHWA may, upon request of an individual or organization, make a copy of the statement as signed by the Regional Federal Highway Administrator available, but such document should be marked "Not Official—Subject to Approval by U.S. Department of Transportation."

k. FHWA's Office of Environmental Policy shall be responsible for:

(1) Submitting copies of the final statement to TEV,

(2) Forwarding copies of the final statement to CEQ.

(3) Informing the Regional Federal Highway Administrator when CEQ is furnished copies of the final statement.

1. The Regional Federal Highway Administrator shall be responsible for:

(1) Assuring that a copy of the final statement as sent to CEQ is furnished the HA; the appropriate State, regional, and metropolitan clearinghouses; and the FHWA division, and

(2) Assuring that the following time limitations have expired prior to FHWA's approval of the location (or design if the location was previously approved).

(a) Ninety (90) days have expired since the draft environmental statements was circulated for comment, sent to CEQ (postmarked), and made available to the public as described in 6g.

(b) Thirty (30) days have expired since the final environmental statement was made available to both CEQ and the public. This time period may run concurrently with the ninety (90) day period.

* * * *

4. On December 2, 1974, the Department of Transportation published (39 Federal Register 41804-41821) new environmental procedures replacing PPM 90-1, although they retain its essential features. They will be codified at 23 C.F.R. Part 771. The portions pertinent to this case are set out below:

§ 771.12 Draft environmental impact statement processing.

(a) The draft EIS shall be prepared by the HA [local highway authority] in consultation with the FHWA for major actions which are Federal actions and which significantly affect the quality of the human environment. The administrative record should include evidence of the FHWA involvement in the development of the EIS, particularly the consultations with the HA on environmental determinations, decisions or conclusions.

(b) The FHWA Division Engineer shall review the draft EIS and if in agreement with the scope and content, take responsibility for the draft EIS by signing and dating the title page before it is released for comment.

(c) The draft EIS shall be circulated by the HA on behalf of FHWA for comment and made available to the public at least 30 days before the public hearing and no later than the publication of first notice for the hearing or opportunity therefor.

* * * *

§ 771.14 Final environmental impact statement processing.

(a) A final EIS shall be prepared by the HA in consultation with FHWA for major FHWA actions which significantly affect the quality of the human environment.

(b) The Regional Federal Highway Administrator shall review the final EIS, including the comments and the evaluations of comments attached thereto, before processing the statement. Appropriate members of the FHWA Regional Office staff, such as engineering, environmental design, right-of-way, civil rights, etc., should be an integral part of the review process. The final EIS shall also be reviewed for legal sufficiency by the FHWA Chief Counsel or his designee. When the Regional Federal Highway Administrator is satisfied with the scope, content and the identification and evaluation of potential significant environmental impacts affecting the quality of human environment, the final EIS shall be processed in the manner specified by paragraphs (c) through (e) of this section.

(c) The Regional Federal Highway Administrator shall submit to the FHWA Washington Headquarters Office (HEV-10) for prior concurrence four (4) copies of the final EIS prepared for highway sections in the following categories:

(1) Highway sections on a new alignment in a metropolitan area of over 100,000 population. The metropolitan area is defined as the area designated

for the purposes of section 134 transportation planning.

(2) Any new controlled access freeway.

(3) Highway sections to which a Federal, State or local governmental agency has expressed opposition on environmental grounds.

(4) Highway sections for which the Federal Highway Administrator requests the Regional Administrator to send the final EIS to the Washington Headquarters Office for review either by the Assistant Secretary for Environment, Safety and Consumer Affairs or by the FHWA Headquarters Office.

(5) Highway sections which would require a section 4(f) determination.

(d) For those final EIS's which require prior concurrence, the FHWA Washington Headquarters Office will notify the Regional Federal Highway Administrator when he may release the final EIS to the public and CEQ, at which time the Regional Federal Highway Administrator will adopt and sign the final EIS and insure that the following distribution is made:

(1) Council on Environmental Quality, 772 Jackson Place, N.W., Washington, D.C. 20006—(5 copies).

(2) Regional Administrator, U.S. Environmental Protection Agency.

(3) State and area-wide clearinghouse.

(4) Agencies, organizations and individuals who made substantive comments on the draft EIS and who requested a copy of the final EIS.

(e) For those final EIS's which do not require prior concurrence, the Regional Federal Highway Administrator may adopt and sign the final EIS after the Regional Office review is completed. He shall then insure that it is distributed to the Washington Headquarters Office (2 copies) and to those noted in paragraph (d) of this section.

(f) Copies of the final EIS should be furnished free of charge to the fullest extent practicable or at a fee which is not more than the actual printing or reproduction cost (See § 771.12(k)).

(g) In limited situations where an EIS is voluminous and the number of comments on a draft EIS is such that distribution of the final EIS to all commenting entities appears impracticable, alternative arrangements for the distribution of the statement may be considered. Where the commenting entities' interest in specific areas can be identified, the alternative arrangements may be the distribution of those sections of the EIS that deal with their specific interests or areas of concern; summaries of those sections noted above; or the response to the comment which is included in the final EIS (see § 771.18(o)(5)).

(h) The final EIS shall be available for public review at the HA headquarters and appropriate field offices, and the FHWA Washington Headquarters, Regional and Division Offices. A copy(s) should also be made available, as appropriate, to public institutions, such as local governments, public libraries and schools to permit them to make it available for public review.

(i) The final EIS shall be reevaluated by the HA and the FHWA prior to proceeding with major project activities for the purpose of determining whether there has been a substantial change in the social, economic and environmental effects of the proposed action. If there are substantial changes in the proposed action that would significantly affect the quality of the human environment, a supplemental statement shall be prepared.

§ 771.18 Content of the environmental impact statement.

(a) *General.* Every effort shall be made to convey the required information in a form easily understood by those expected to comment upon the draft EIS, Substance of the information conveyed rather than the length or detail of the statement should be stressed. Succinctness and brevity, consistent with the scale and impact of the proposed action and the information to be transmitted, should be the aim of those preparing the EIS. For example, all the sections outlined in paragraphs (g) through (m) of this section are not required if the information is adequately covered in another section.

(b) *Reports and studies.* The EIS should briefly summarize and reference in the text underlying studies, reports and other information considered in preparing the statement. Referenced reports should be those readily available to commenting entities upon request or as a minimum available for review and copying at a convenient location. If supporting

documents are appended to the statements, care is to be taken to insure that the statement is self-contained without the need for undue cross reference. The level of the summary should be commensurate with the scale of the proposed action and the impact.

* * * *

(g) *Description of the proposed action and alternatives considered, and the social, economic and environmental context.* This section is to include, in summary form, information such as the following listing concerning the basis for the proposed action, highway and traffic engineering factors, features to reduce or eliminate adverse environmental impacts, estimated highway costs, anticipated traffic and region benefits (traffic associated), public services, and existing significant land uses and natural and cultural features in the study area.

(1) Location, type facility and length (new and existing alignment).

(2) Traffic data and number of lanes.

(3) Predominant right-of-way width and access control (existing and proposed.

(4) Other major design features such as the general horizontal and vertical alignment and the location of interchanges, separation structures, at-grade intersections, river crossings, etc.

(5) Deficiencies of the existing facilities and the planning basis for the proposed action, including anticipated benefits to the State, region and community, and the relationship between this highway

section and the total transportation requirements for the area.

(6) Anticipated safety benefits or lack thereof if project is not built.

(7) Summary of any technical, social and economic studies made during the development of the proposed action.

(8) The current status of the proposal with a brief historical résumé and an estimate of when the proposal may be constructed.

(9) A general description of the surrounding terrain.

(10) Inventory of pertinent economic factors such as employment, taxes, property value, etc.

(11) Surrounding natural and cultural features such as towns, lakes, streams, mountains, historic sites, landmarks, institutions, developed areas, principal roads and highways, and similar features that are pertinent to the study.

(12) General description of the surrounding neighborhoods including population and growth characteristics, and ethnic composition.

(13) Vicinity and detailed maps, sketches, pictures, layouts and other visual exhibits should be used to show specific involvement in order to give a layman reviewer a reasonable understanding of the impact.

(14) Public facilities and services, including religious, health and educational facilities, and public utilities, fire protection and other emergency services.

(15) Esthetic and other values, including visual quality such as: "view of the road" and the joint development and multiple use of space.

(h) *Land use planning.* This section should describe the scope and status of the planning process for the area and should discuss the relationship between the proposed action and land use and public facility plans, policies and controls as have been promulgated by the affected community. Existing and proposed land use (a map preferable) including, where applicable, other proposed Federal actions in the area affected should also be discussed. Where conflicts or inconsistencies exist, this section should describe the extent of reconciliation and the reason for proceeding notwithstanding the absence of full reconciliation.

(i) *The probable impact of the proposed action on the environment.* This section is to describe the significant beneficial and detrimental environmental consequences anticipated if the proposed action is implemented. The level of importance of environmental factors and the level of the impact will vary with the nature, scale and location of the proposed action. For example, impact on the nesting grounds of an endangered species would be significant while a similar impact on the nesting grounds of a species which is in abundance may not be significant. Likewise, the significance of a high noise level is much different in a residential area than in an industrial area.

(1) Highways may stimulate or induce other actions (secondary actions) such as more rapid land

development or changed patterns of social and economic activities. Impacts associated with secondary actions, through their impacts on existing community facilities and activities, through inducing new facilities and activities or through changes in natural conditions may often be even more substantial than the primary impacts associated with construction of the highway. For instance, the effect on population and area growth associated with the construction of new highways may be among the more significant impacts. Such impacts associated with an anticipated secondary actions should be assessed and discussed in this section of the EIS.

(2) Direct (primary) impacts upon the narrow band adjacent to the highway may be included when significant to the whole of the region or the community. The discussions under this section should address the probable significant impacts of the action (as opposed to individual alternative locations or designs). These might include the probable impact upon elements, factors and features listed below.

(i) *Natural, ecological or scenic resources impacts.* This section will summarize the significant effects on natural, ecological and scenic resources anticipated to be associated with the implementation of the proposed action, including a summary of consultations with the appropriate public and governmental agencies. One example of a natural resource impact would be the effect an action would have on the consumption of energy resources.

(ii) *Relocation of indiivduals and families impacts.* This section will briefly summarize the relocation assistance program and assess the impacts associated with significant relocation of people and businesses, including consultations with housing agencies and information on the anticipated relocation housing programs. This section will include, to the extent appropriate, information such as the following that is obtainable by visual inspection of the area and from readily available secondary sources or community sources; an estimate of households to be displaced, including the family characteristics (e.g. minorities, income levels, tenure, the elderly, large families); divisive or disruptive effect on the community, such as separation of residences from community facilities or separation of neighborhoods; impact on the neighborhood and housing where relocation is likely to take place; an estimate of the businesses to be displaced and the general effect of business dislocation on the economy of the community; a description of relocation housing in the area, and the ability to provide adequate relocation housing for the types of families to be displaced; a description of special relocation advisory services that will be necessary for identified unusual conditions; a description of the actions proposed to remedy insufficient relocation housing, including, if necessary, housing of last resort; and results of consultation with local officials, social agencies, and community groups regarding the impacts on the community affected.

(iii) *Social impacts.* This section will include a

discussion of the significant social impacts anticipated to be caused by the proposed action. The following are examples of groups that may have special problems and require special consideration with respect to access to jobs, schools, churches, parks, hospitals, shopping, and community services:

(A) elderly
(B) school-age children
(C) those dependent upon public transportation
(D) handicapped
(E) illiterate
(F) nondrivers
(G) pedestrians
(H) bicyclists
(I) low income
(J) racial, ethnic, or religious groups

(iv) *Air quality.*

(A) This section shall include: an identification of the air quality impact of the highway section; and identification of the analysis methodology utilized; a brief summary of the early consultation with the air pollution control agency and, where applicable, a brief summary of any consultation with the indirect source review agency; any comments received from the air pollution control agency, and, where applicable, any comments received from the indirect source review agency; and the Highway Agency's determination on the consistency of each alternative under consideration with the approved State implementation plan.

(B) Where required by 40 CFR 51.18, the preferred alternative shall be submitted to the indirect source review agency for review. The proposed final EIS shall not be submitted to FHWA for adoption if the indirect source review agency has found, as a part of the procedures established pursuant to 40 CFR 51.18, that the highway section will result in a violation of applicable portions of the control strategy or will interfere with the attainment or maintenance of the National Ambient Air Quality Standards.

(C) The final EIS should include any comments received from the air pollution control agency concerning the consistency of the proposal with the State implementation plan.

(D) The final EIS may be adopted by the FHWA only after FHWA has determined that the proposed highway section is consistent with the approved State implementation plan. The determination on consistency shall be made by the Regional Federal Highway Administrator.

(v) *Noise impacts.* If highway-generated noise is a significant factor, this section will include a discussion of the possible noise problems and a summary of the noise analysis information. The summary should include:

(A) Information on the numbers and types of activities which may be affected.

(B) Extent of the impact (in decibels).

(C) Likelihood that noise abatement measures can reduce the noise impacts.

(D) Noise abatement measures which will likely be incorporated in the project.

(E) Noise problems for which no apparent solution is available.

(vi) *Water quality impacts.* Include in this section a discussion on significant water quality impacts, including summaries of analyses and consultations with the agency responsible for the State water quality standards. Possible water quality impacts related to highways include: erosion and subsequent sedimentation problems; use of deicing, weed, rodent and insect control products; waste water disposal at safety roadside rest areas; spillage of poisons or chemicals by trucks into a water supply system; and contamination of surface and ground water supplies and of recharge areas by polluted fill material.

(vii) *Wetlands and coastal zones impacts.* This section will summarize the anticipated significant impacts on wetlands and coastal zones, including analyses, consultations and efforts to reduce the impact. Where applicable, the discussion should set forth any inconsistencies with wetlands or coastal zone management programs.

(viii) *Stream modification or impoundment impacts.* This section will include a summary of information which is necessary to comply with 16 U.S.C. 662(a). Briefly, 16 U.S.C. 662(a) requires consultation with the U.S. Fish and Wildlife Service and the appropriate State agency when a Federal action involves impoundment (surface area 10 acres or more), diversion channel deepening or other modification of a stream or body of water. The draft EIS is to include a summary of the early consultation.

(ix) *Flood hazard evaluation.* When an alternative under consideration significantly encroaches on a flood plain, this section will include a summary of studies and consultation made for compliance with the FHWA directive[2] implementing Executive Order 11296 and Flood Hazard Evaluation Guidelines for Federal Executive Agencies, or information evidencing that such requirements can be met during project development.

(x) *Construction impacts.* In general, adverse impacts during construction will be less important than long-term impacts. However, if appropriate, the EIS should discuss significant impacts (particularly air, noise and water) associated with construction. Also, where applicable the impact of the proposed disposal method and the impact of borrow areas should be discussed.

(3) This section will also include a discussion of practicable and feasible measures to avoid or reduce the adverse impact, and their relative cost and benefits, where appropriate. The discussion should include the full range of reasonable measures to resolve or minimize anticipated problems and the pros and cons of each.

(j) *Alternatives.* (1) This section shall include a discussion, with maps and other visual aids, as ap-

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[2] Vol. 6, Ch. 7, Sec. 3, Subsec. 2 of the Federal-Aid Highway Program Manual, which is available for inspection and copying as prescribed in 49 CFR Part 7, App. D.

propriate, of the reasonable alternatives studied in detail, including those that might enhance environmental quality or avoid some or all of the adverse environmental effects. Examples of such alternatives include alternate locations and designs, not implementing the proposed action, postponing the action, providing a lower level of service, providing a reduced facility (lanes/design), and an increase or decrease in public transportation.

(2) The probable beneficial and adverse effects and costs of reasonable alternatives are to be described in a manner consistent with the scale of the proposed highway improvement and significance of the impact. The discussion of environmental impacts in this section includes significant impacts associated with the alternatives themselves, as opposed to the discussion of regional environmental impacts associated with implementing the action.

(3) The draft environmental statement should indicate that all alternatives are under consideration and that a specific alternative will be selected by the HA following the public hearing. The final environmental statement will be prepared for the selected alternative.

(k) *Probable adverse environmental effects which cannot be avoided.* Unavoidable impacts such as water, noise or air pollution; damage to life systems; threats to health; undesirable land use patterns; effects on minorities, etc., will be summarized in this section. These will be adverse environmental

effects identified in paragraph (i) of this section for which the use of reasonable corrective or abatement measures will not reduce the impact to acceptable levels.

(l) *The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.* This section should contain a brief discussion of the context to which the proposed action involves trade-offs between short-term environmental gains at the expense of long-term environmental losses, or vice-versa, and a discussion of the extent to which the proposed action forecloses future options. In this context, short-term and long-term do not refer to any fixed time period, but should be viewed in terms of the environmentally significant consequences of the proposed action. The gains (short-term and long-term) may be the benefits associated with a proposed highway to the area or region such as improved transportation, reduction of traffic congestion, improvement in air quality, reduction in noise, improved economic base, accessibility, improved development potential, etc. The losses (short- and long-term) may be the disadvantages associated with the proposed highway, such as use of land by the highway, use of land for highway-associated developments (residential and industrial), loss of parks and recreation areas, and increased pollution (air, water and noise) and impacts on open space, wetlands, etc.

(m) *Irreversible and irretrievable commitments of resources.* This requires an identification of the

extent to which the irreversible adverse effects (see paragraph (k) of this section) curtail the range of potential uses of the environment. "Resources" means the full range of natural and cultural resources committed to loss or destruction by the action and is not to be interpreted to mean only the labor and materials committed to the project. A transportation facility may precipitate other related actions such as land development, exploitation of resources, travel, etc., that could induce a significant irreversible commitment which would curtail other use of the area.

(n) *The impact on properties and sites of historic and cultural significance.* (1) To determine whether the project will have an effect on properties of State or local historical, architectural, archaeological, or cultural significance, the HA should consult with the State Historic Preservation Officer (SHPO), with the local official having jurisdiction of the property, and where appropriate, with historical societies, museums, or academic institutions having expertise with regard to the property.

(2) This section of the draft EIS should contain an identification of properties included in or eligible for inclusion in the National Register and an evaluation of the effect the proposed action would have on such properties. It should also contain a record of the coordination with the SHPO concerning the identification of such properties and the evaluation of effect.

(3) This section of the final EIS should also contain (a) documentation supporting a finding of no adverse effect and a record of coordination with the

Executive Director, Advisory Council on Historic Preservation (ACHP), or (b) an executed Memorandum of Agreement when an adverse effect has been established, or comments from the Council after consideration of the project at a meeting of the ACHP and an account of actions to be taken in response to the comments of the ACHP.

(o) *Comments and coordination.* (1) The draft EIS shall include a summary of coordination and public and minority involvement during the development of the project and pertinent comments received during the coordination.

(2) The draft EIS shall be revised, as appropriate, to reflect the consideration given to substantive comments received. The final EIS shall include a copy of all substantive comments received (or summaries thereof where response has been exceptionally voluminous), along with a discussion of each substantive comment and suggestion. When the draft EIS is revised as a result of comments received, the copy of the comment should contain marginal references indicating the page and paragraph where revisions were made or the discussion of comments should contain such references.

(3) Any letters or material received from a commenting entity which is not legible when reproduced may be summarized by the HA. Every effort shall be made to insure that the statement will be legible when reproduced.

(4) Any unresolved environmental issues and efforts to resolve them would be discussed in this section.

(5) The final EIS should contain a summary and disposition of substantive social, economic, environmental and other comments made at the public hearing, including the alternatives which were raised.

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In the Supreme Court of the United States

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v.

AMERICAN CIVIL LIBERTIES UNION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUGGESTION OF MOOTNESS

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUGGESTION OF MOOTNESS

The issue in this case is the constitutionality of Section 104(b) of the Federal Election Campaign Act of 1971, which is part of Title I of that Act. Section 104 imposes dollar limits upon spending for the use of communications media by candidates for federal office in both primary and general elections and provides certain procedures by which such limitations are enforced in connection with the publication for a charge of political advertisements by the media. A three-judge court held Section 104(b) unconstitutional, and this Court noted probable jurisdiction of the appeal on June 10, 1974. 417 U.S. 944.

On October 15, 1974, the President signed the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 *et seq*. That Act, which became effective January 1, 1975, made major changes in the law governing federal election campaigns. It also created the Federal Election Commission to administer the new law.

Section 205(b) of the 1974 Amendments, 88 Stat. 1278, repealed Title I of the 1971 Act. Section 208(b) of the Amendments, however, provided that until all members of the Federal Election Commission and its general counsel had been appointed and qualified and until the transfer, within 30 days of the date of the appointment of the foregoing officials, of certain records to the Commission by the Comptroller General, the Secretary of the Senate and the Clerk of the House of Representatives (who had certain responsibilities in connection with the administration of the 1971 Act), the latter three individuals "shall continue to carry out their responsibilities under" Titles I and III of the 1971 Act.

The members of the Federal Election Commission and its general counsel have been appointed, and the transfer of records was made on May 30, 1975. See 40 Fed. Reg. 23832 (June 2, 1975).

The present case is now moot, since it involves the constitutionality of a provision of an Act of Congress that has been repealed and is no longer operative. Accordingly, the judgment of the district court should be vacated, and the case should be remanded to that court

with instructions to dismiss the complaint as moot. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36.[1]

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

JUNE 1975.

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[1]In their brief on the merits, filed in March 1975, appellees recognized that the case was moot (Br. 16-22), but suggested that the case should be remanded to the district court "to allow Appellees to amend their complaint to challenge those provisions of the new law which may affect them" (Br. 22). The constitutionality of the 1974 Amendments, however, presents different issues, and there is no occasion to permit the present complaint to stand. Indeed, the validity of the new amendments is now being litigated before the United States Court of Appeals for the District of Columbia Circuit in a suit in which appellee New York Civil Liberties Union, Inc., is a party-plaintiff. *Buckley* v. *Valeo*, No. 75-1061.

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No. 74-1413

In the

Supreme Court of the United States

October Term, 1974

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL.,

Petitioners

v.

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute and regulations involved	3
Statement	3
Reasons why writ should be denied	7
Conclusion	15
Appendix A	1a

CITATIONS

Cases:

Aberdeen & Rockfish Railroad v. *SCRAP,* 7 ERC 2009, 43 U.S.L.W. 4844, (U.S. June 24, 1975)	14
Appalachian Mountain Club v. *Brinegar,* D.N.H., Civ. Nos. 74-208, 74-219, decided March 25, 1975	9
Citizens Environmental Council v. *Volpe,* 484 F.2d 870	8
Essex County Preservation Association v. *Campbell,* D.Mass., Civ. No. 74-2680M, decided July 9, 1975	9

Cases--Continued

	Page
Finish Altoona's Interstate Right, Inc. v. *Volpe*, 484 F.2d 638, affirming 355 F. Supp. 933	8
Greene County Planning Board v. *Federal Power Commission*, 455 F.2d 412, certiorari denied, 409 U.S. 849	6, 8
I-291 Why? Association v. *Burns*, ___ F.2d ___, (2nd Cir. 1975), 6 ERC 1275	7, 9
Iowa Citizens for Environmental Quality, Inc. v. *Volpe*, 487 F.2d 849	8
Life of the Land v. *Brinegar*, 485 F.2d 460	8, 9
Movement Against Destruction v. *Volpe*, 500 F.2d 29, affirming 361 F. Supp. 1360	8
Sierra Club v. *Morton*, ____ F.2d ___, (D.C. Cir. 1975), 7 ERC 1768	13, 14
Swain v. *Brinegar*, 7th Cir., Civil No. 74-1625, decided April 29, 1975	7
Udall v. *Tallman*, 380 U.S. 1,16,	13
U.S. v. *SCRAP, 412 U.S. 669*	7

Statutes, regulations, and rules:

	Page
Department of Transportation Act of 1966, Section 4 (f), 49 U.S.C. 1653 (f)	4
Federal Highway Administration Policy and Procedure Memo (PPM 90-1), 37 Fed.Reg. 21809-21816	3, 4, 10, 1a
Federal Rules of Civil Procedure, Rule 52(a)	2
Intergovernmental Cooperation Act of 1968, 42 U.S.C. 4231 (b)	10
National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332 *et seq.*: Section 102 (2) (c)	*passim*

Statutes, regulations, and rules--Continued

	Page
23 C.F.R. 771.12 (a)	9
40 C.F.R. 1500.7 (c)	1a

Miscellaneous:

	Page
"Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements", 3 BNA Environmental Reporter, Current Developments, May 19, 1972 at 82-87	12
Peterson and Kennan, "The Federal Highway Program: Administrative Procedures and Judicial Interpretation", 2 ELR 40001 (1972).	11
Third Annual Report of the Council on Environmental Quality (1972)	12
H.R. Rep. No. 94-111, 94th Cong., 1st Sess. (Parts 1 and 2) (1975)	10
Sen. Rep. No. 94-152, 94th Cong., 2d Sess. (1975)	10

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VERMONT, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinions of the district court are reported at 343 F. Supp. 761 (App. B of Petition) [*Conservation Society I*] and 362 F. Supp. 627 (App. C of Petition) [*Conservation Society II*]. The opinion of the Court of Appeals for the Second Circuit is reported at 508 F. 2d 927 (App. A of Petition).

Jurisdiction

The Petition adequately sets forth the jurisdictional requisites.

Questions Presented

1. Whether the district court's finding, as a matter of fact, that an environmental impact statement, prepared by an "inherently biased" state agency and subsequently "rubber stamped" by the responsible federal official, was not the environmental impact statement required to be prepared by the responsible federal official by Section 102 (2)(C) of the National Environmental Policy Act of 1969 is clearly erroneous (Fed.R.Civ.P. 52(a)).

2. Whether the federal "partnership", found by the district court to exist with the states of Connecticut, Massachusetts and Vermont, by and through which the responsible federal official studies, plans, proposes and funds the eventual construction of a superhighway through the three states, requires the responsible federal official to prepare and file an environmental impact statement on the three-state superhighway prior

to construction of one of its segments in Vermont.

Statute and Regulations Involved

The Petition sets forth at pp. 117a-146a the pertinent provisions of the National Environmental Policy Act of 1969 (NEPA), the implementing policy and procedure memorandum of the Federal Highway Administration (PPM 90-1) and the Guidelines of the Council on Environmental Quality (the "guidelines"). Other relevant portions of PPM 90-1 and the guidelines are set out in Appendix A, *infra*.

Statement

United States Route 7 (Route 7) is the principal north-south highway in westernmost New England. Beginning at Norwalk in southern Connecticut, Route 7 wends its way northerly through Connecticut, Massachusetts and Vermont some 280 miles to its northern terminus near the Canadian border at Burlington, Vermont. The three states, with the knowledge and cooperation of the Federal Highway Administration (FHWA), have as their long-range goal the eventual relocation and conversion of existing Route 7 into a divided, limited-access superhighway (App. A of Petition, pps. 3a-4a; App. C of Petition, pps. 63a-64a). Acting in response to an express legislative mandate the Vermont highway department in Spring 1972 began construction of a 20-mile segment of relocated Route 7 between Bennington and Manchester, Vermont. On May 4, 1972 some of the respondents sued the Petitioners and the state

respondents in the United States District Court for the District of Vermont.[1] On October 26, 1972, Honorable James L. Oakes, United States Circuit Judge, sitting by designation, permanently enjoined the segment's construction pending preparation of the environmental impact statement (EIS) required by Section 102(2) (C) of NEPA[2] and Section 4(f) of the Department of Transportation Act of 1966.[3]

Pursuant to its own regulations implementing NEPA (PPM 90-1), (App. F. of Petition, pps. 119a-127a) FHWA delegated preparation of the EIS to the Vermont highway department. After a perfunctory review, "the equivalent of an agency rubber stamp",

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[1] The respondents include, in addition to plaintiff-appellees below, certain state officials who were defendants at trial. Since these officials have elected not to respond to the Petition, and for the sake of clarity, the term "respondents" hereinafter refers only to plaintiff-appellees below.

[2] NEPA requires at 42 U.S.C. 4332, in part:

> The Congress authorizes and directs that, to the fullest extent possible:
>
> * * *
>
> (2) all Agencies of the Federal Government shall-...(C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a detailed statement by the responsible official...

[3] Section 4 (f), 49 U.S.C. 1653 (f), forbids the Secretary of Transportation to approve construction which uses a publicly owned park or recreation area, or wildlife or waterfowl refuge unless he finds there is no feasible and prudent alternative to the use of such land. To date defendants have not complied with this requirement of the district court's order.

the FHWA adopted the highway department's EIS (App. C of the Petition, p. 52a).

On March 20, 1973 the Petitioners and state defendants jointly moved to dissolve the injunction. After hearings and receipt of further evidence, the district court concluded that the EIS, while sufficient to support two-lane construction, was inherently biased in favor of the project because its preparer, the Vermont highway department, was acting under a legislative mandate to construct the road (*id.* at 56a). Moreover, the court said, NEPA requires "...the *federal agency making the decision* [to] consider environmental values, potential alternatives and the overall consequences of the proposed action" (*id.* at 53a) (emphasis not added). Accordingly, the court required "genuine FHWA preparation of an EIS" (*ibid.*).

In addition, the court ordered FHWA to prepare an overall EIS on the entire Route 7 corridor (*id.* at 68a) as a condition to construction of the Vermont segment. Although "there is no overall federal plan for improvement of the Route 7 corridor in the three states" (*id.* at 64a), the court said, "each of the three states' highway departments are looking toward this end as possible of accomplishment with legislative and federal approval over a long-range period of time, with federal approval taking place on an ad hoc basis at the division engineer level" (*ibid.*). Since "construction of isolated sections along the corridor will induce traffic, tending further to require additional construction" (*ibid.*), "an overall EIS for all of Route 7 would have one major consideration in mind, whether a superhighway is environmentally and otherwise the most viable alternative" (*id.* at 67a).

The court of appeals affirmed. Relying principally on *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972) (*Greene County*), and The Council on Environmental Quality's (CEQ) guidelines the court adopted "a stringent rule requiring FHWA preparation of the EIS" (App. A of Petition, p. 11a). Requiring genuine FHWA preparation not only carries out the explicit mandate of NEPA (*id.* at 8a) but also achieves two highly desirable practical results. First, it eliminates the possibility that state bias will infect the initial federal decision (*id.* at 9a). Second, it will substantially, and perhaps entirely, eliminate the necessity for litigation on the extent of federal participation in the EIS process (*id.* at 10a). Accordingly, the holding effectuates Congressional policy and serves judicial economy.

The court of appeals also did "not disturb the district court's conclusion that an ultimate Route 7 superhighway is the expectation of state agencies with the knowledge and cooperation of the Federal government" (*id.* at 16a). The court noted that "[t]he appropriateness of ordering impact statements for entire development programs when a proposal before an agency covers only one portion of a more massive undertaking is not a novel issue to the courts" (*id.* at 18a). The court then applied NEPA, relevant federal regulations and judicial precedents to the facts as found and concluded that they "appear to afford ample basis for Judge Oakes' determination that a corridor EIS is required" (*id.* at 19a-20a). Moreover, the court of appeals stated, "the district court...did not abuse its discretion in concluding that the time was appropriate

for early, comprehensive and meaningful consideration of the environmental impact of an alternative to continued highway expansion in the Route 7 corridor" (*ibid.*).

Reasons Why the Writ Should Be Denied

1. Federal agencies have "the primary responsibility for the implementation of NEPA". *U.S.* v. *SCRAP*, 412 U.S. 669, 694 (1973). The instant case presents the issue whether a federal agency properly discharges this responsibility when it completely delegates the preparation of an EIS to an inherently biased state agency. In Vermont, the State legislature mandated construction of Route 7. Thus, in the words of the district court, "it is impossible for the [Vermont highway department] not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency" (App. C of Petition, p. 50a). The presence of a legislatively mandated agency represents a critical finding of fact upon which the Second Circuit, in large part, posited its decision that "the requisite EIS be prepared by the FHWA, the responsible federal agency" (App. A of Petition, pps. 9a, 12a-13a). Another panel of the Second Circuit has noted that the "standard of primary and non-delegable responsibility" does not necessarily imply "a *per se* rule to the effect that state participation in the preparation of an EIS renders it invalid." *I-291 Why? Association* v. *Burns*, ____F. 2d ____(2nd Cir. 1975), 6 ERC 1275.[4] Thus, while the Fourth, Fifth, Eighth, Ninth and Tenth Circuits have permitted state

[4] But see *Swain* v. *Brinegar*, Civil No. 74-1625 (7th Cir., April 29, 1975).

agencies to prepare impact statements under federal control, such decisions were made in the absence of a finding that the state agencies were inherently biased.[5]

[5]Moreover, four of these circuits have factually distinguished their holdings on the question of preparation from either *Greene County* or *Conservation Society II*.

In *Finish Altoona's Interstate Right* v. *Volpe*, 484 F. 2d 638 (5th Cir. 1973), the district court had found that "the Secretary did not merely rubber stamp the State's work..." 355 F. Supp. 933, 938 (D.Ga. 1973). He "...prepared a detailed report treating various alternatives and suggested specific design measures intended to minimize harm to the environment". *Id.* at 937.

In *Iowa Citizens for Environmental Quality* v. *Volpe*, 487 F. 2d 849 (8th Cir. 1973) *aff'g.* F. Supp. (D. Iowa 1972), 4 ERC 1755, the Eighth Circuit, while relying heavily on compliance with PPM 90-1, did posit its holding, in part, on the district court's finding that "the record is clear that FHWA did not merely rubber stamp the State's work. FHWA recommended changes in the draft statement and supplemented the final EIS by additional information." 4 ERC at 1759.

In an analogous decision involving the Federal Aviation Administration the Ninth Circuit, in approving an applicant's EIS, noted that "unlike *Greene County* and *Conservation Society II* the federal agency involved here did not 'abdicate a significant part of its responsibility' to another organization". *Life of the Land* v. *Brinegar*, 485 F. 2d 460, 468 (9th Cir. 1973).

In *Citizens Environmental Council* v. *Volpe*, 484 F. 2d 870 (10th Cir. 1973), the Tenth Circuit explicitly found that "the Secretary of Transportation did not simply rubber-stamp the State's work". *Id.* at 873.

The remaining circuit, the Fourth, in *Movement Against Destruction* v. *Volpe*, 500 F. 2d 29 (4th Cir. 1973), in a *per curiam* opinion, affirmed "upon the opinion of the district court". *Id.* at 30. The district court did not directly address the issue of preparation, noting in passing only that "the FHWA ...acted with good faith objectivity in reviewing and accepting" the EIS. 361 F. Supp. 1360, 1393 (D. Md. 1973).

In so far as these decisions differ from *Conservation Society II*, they differ only in the degree to which they permit state agency involvement under different facts. When analyzed in light of the Second Circuit's clarifying language in *I-291 Why?, supra*, the differences among the circuits are much narrower than the Petitioners assert.[6]

Accordingly, it is not clear that the Petitioners face the dilemma "of attempting to comply with NEPA only to be told, at a later date, that their understanding of the statute was incorrect and they must start again" (Petition, p. 12). Nor it is clear that the Petitioners are unable to resolve their problem by simple administrative remedy. For example, the step of changing the word "shall" to "may" in the first sentence of 23 CFR part 771.12(a) (App. F of Petition, p. 128a) would permit Petitioners to tailor the degree of their involvement to the facts of each impact statement. When a state agency is inherently biased, *e.g.* it operates pursuant to legislative mandate, then Petitioners may protect NEPA's goals by enforcing the Second Circuit standard.[7] Under other circumstances,

[6]No circuit which has addressed the issue has decided that the *federal* agency is not responsible for the EIS.

[7]A recent decision in the District of Massachusetts applies this very test to an EIS prepared by a consultant with a financial stake in an affirmative federal decision to proceed with a highway project. While rejecting a rigid *per se* rule against delegation, the district court held that "the possibility that a financially interested party may unconsciously stack the deck" requires genuine FHWA preparation of the EIS. *Essex County Preservation Association* v. *Campbell*, Civil No. 74-2680M (D. Mass., July 9, 1975). See also *Appalachian Mountain Club* v. *Brinegar*, Civil Nos. 74-208, 74-219 (D.N.H. March 25, 1975). *Contra, Life of the Land* v. *Brinegar*, 485 F. 2d 460 (9th Cir. 1973).

however, they may delegate a greater share of EIS preparation to the state without jeopardizing either their independent judgment or NEPA's policy goals. To some extent, therefore, Petitioners' inflexibility in their own administrative interpretations of NEPA has created the very uncertainty which they claim this Court must resolve.

Since the date on which Petitioners filed their Petition, both houses of Congress have passed different versions of H.R.3130, a bill which may affect the decision in *Conservation Society II*. This legislation is now in a committee of conference and respondents will advise the Court of any developments which may bear upon the questions presented.

2. Petitioners admit that they "ha[ve] a responsibility to examine, in a timely fashion, the overall effects of a decision to build a highway through a long 'corridor' " (Petition, p. 19). Yet, Petitioners' regulations proscribe such an examination by means of a "program impact statement." PPM 90-1 restricts the preparation of an EIS to "each highway section" (App. F of Petition, p. 119a). A highway section is just that: a segment of highway based on a single location study (App. A, *infra*, p. la). Indeed, Petitioners' argument that no EIS is required "until a state proposes a discrete segment of highway for consideration or construction" is internally inconsistent with their prior position acknowledging their responsibility for "program impact statements". Under the reasoning advanced by Petitioners, Connecticut, Massachusetts and Vermont would have to propose simultaneously literally scores of "highway sections", representing the

entire corridor, in order to have NEPA's requirements attach for the purpose of a corridor impact statement.

Petitioners' assertion that "[a] superhighway through the 'Route 7 corridor' is a gleam in the eye of the planners of the three states" (Petition, p. 21) ignores the district court's findings of fact that the three states, working in "partnership" with federal highway officials, are contemplating or have already constructed an expressway in a number of segments along the Route 7 corridor (App. C of Petition pps. 63a-64a). While it is true that "no overall federal plan for improvement of the Route 7 corridor" exists (*ibid.*), state and federal activity does include, on a piecemeal basis, planned or programed construction in Connecticut and Vermont and proposals for construction in Massachusetts (*ibid.*). At the time of the district court's hearing on Petitioners' motion to dissolve the injunction, the Respondents introduced numerous exhibits showing federal knowledge of, participation in and funding for studies, plans or proposals leading to construction of segments of a superhighway in the Route 7 corridor.[8] In many instances, the states utilized federal planning money (*ibid.*). These facts indicated to the district court and the circuit court that the appropriate time had arrived for the Petitioners to prepare and file an overall EIS for the Route 7 corridor prior to construction of the

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[8]According to two commentators, the state's planning role is materially affected by the FHWA and subject to the constraints of a close state-federal working relationship. Peterson and Kennan, *The Federal Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ELR 40001 (1972).

Bennington to Manchester segment.[9]

The district court and the circuit court did not make up from whole cloth NEPA's application to these facts. On May 16, 1972 CEQ issued a "Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements."[10] Recommendation No. 9 of this Memorandum provided, in part, that:

> ...In many cases broad program statements will be appropriate, assessing the environmental effects of a number of individual actions on a given geographical area, or the overall impact of a large scale program or chain of *contemplated* projects, or the environmental implications of research activities that have reached the stage of investment or commitment to implementation likely to restrict later alternatives. Preparation of program statements in these cases should be in addition to preparation of subsequent statements on major individual actions wherever such actions have significant environmental impacts that were not fully evaluated in a program statement (emphasis added).

[9]The district court based its holding not only on NEPA but also on the Intergovernmental Cooperation Act of 1968, 42 U.S.C. 4231(b) which provides, in pertinent part, that "All viewpoints -- national, regional, state, and local -- shall, to the extent possible, be fully considered and taken into account in planning Federal or Federally-assisted development programs and projects". Since the circuit court felt that NEPA was clearly controlling, it did not review the district court's reliance on the Intergovernmental Cooperation Act. See App. A of Petition p. 20a, n. 44.

[10]Reprinted in 3 BNA Environment Reporter, Current Developments, May 19, 1972, at 82-87. See also CEQ, *Environmental Quality, Third Annual Report*, 233-34 (1972).

Shortly after the district court handed down its decision in *Conservation Society II* on July 27, 1973, CEQ codified this recommendation in its guidelines (see App. A, *infra*, pps. 1a-2a). As Petitioners note, CEQ's interpretation of NEPA is entitled to deference (Petition, p. 16). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Petitioners argue that even if the findings of fact below support the conclusion that a larger project is contemplated, the Bennington to Manchester section should be advanced to construction because it has "independent local utility" (Petition, p. 22). Such a view, however, once again ignores a critical finding of fact below. The district court specifically found "that the construction of isolated sections along the corridor will induce traffic, tending further to require additional construction beyond presently planned termini" (App. C of Petition, p. 68a). The circuit court noted that "Judge Oakes was equally concerned with the irretrievable commitment of federal funds to local highway projects without early attention to possible alternatives to highway development" (App. A of Petition, p. 19a). Accordingly, it affirmed this part of the district court's decision "with a sensitive eye to the options often imperceptibly foreclosed by fragmented growth" (*ibid.*).

The Second Circuit's decision does not conflict with the decisions of five other circuits, as Petitioners maintain (see cases cited in Petition, p. 18).[11] It is true that it stands alone, but only on the basis of its facts. The facts indicate, contrary to Petitioners' assertion,

[11]See also *Sierra Club* v. *Morton*, ___ F. 2d ___ (D.C. Cir. 1975), 7 ERC 1977, 1990, n. 29.

that the district court in ordering the preparation of a corridor EIS, and the court of appeals, in affirming, came to grips directly with the problem of timing. The claim of Petitioners that no major action has been proposed for the entire corridor, or, in the alternative, that such action is so tenuous as to avoid the application of NEPA, conflicts not only with the holding of the district court, affirmed by the circuit court, but also with the interpretation of the District of Columbia Circuit. That court recently distinguished the facts in *Conservation Society II* from the facts in *Sierra Club* v. *Morton*, ____ F 2d ____ (D.C. Cir. 1975), 7 ERC 1977. The District of Columbia Circuit said:

> In *Conservation Society* [*II*] the scope of the proposed action was clear -- the entire 280 mile length of Route 7 -- and irretrievable commitments --the 20-mile segment under construction -- were being made that would determine the course of future action. Thus the proposal was sufficiently ripe to demand preparation of a comprehensive impact statement. *Id.* at 1993, n. 34.

Moreover, the specific findings of the district court detailing federal "partnership" at various levels with the three states' planning process for the superhighway establishes the requisite federal involvement to bring the facts of the instant case within this Court's recent interpretation of federal action in *Aberdeen and Rockfish Railroad* v. *SCRAP*, 43 U.S.L.W. 4844, 4853 (U.S. June 24, 1975).

Had the courts below not required a corridor "program statement" on the basis of the facts in the instant case, in all likelihood the three-state

superhighway would have been constructed on the basis of "discrete segment" impact statements without the preparation and filing of the comprehensive corridor statement NEPA requires.

Conclusion

For the reasons stated the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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July, 1975

APPENDIX A

1. Federal Highway Administration Policy and Procedure Memorandum (PPM) 90-1, 37 Fed. Reg. 21809-21816, in effect throughout the course of litigation in the lower courts, provides in part:

> 3. *Definitions* (as used in this memorandum)
>
> a. *Highway Section* - a substantial length of highway between logical termini (major cross-roads, population centers, major traffic generators, or similar major highway control elements) as normally included in a single location study. (See paragraph 6).

2. The Guidelines of the Council on Environmental Quality are published at 40 C.F.R. 1500 *et seq.* (1973). A relevant portion provides at Section 1500.6(d) (1) in part:

> Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as a subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g. coal leases), or environmental impact that are generic or common to a series of agency actions (e.g. Maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g. major lengths of highway as opposed to small segments).

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OCTOBER TERM, 1975

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v.

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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Solicitor General,
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Washington, D.C. 20530.

In the Supreme Court of the United States

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

This supplemental memorandum discusses important congressional action and a decision by this Court subsequent to the filing of our petition.

1. On August 9, 1975, President Ford signed Public Law 94-83, amending Section 102(2) of the National Environmental Policy Act of 1969.[1] Pub. L. 94-83 moots the first question presented by our petition; it provides that an environmental impact statement "shall not be deemed to be legally insufficient solely by reason of having been pre-

---

[1]Pub. L. 94-83 is printed as an Appendix to this Memorandum.

pared by a State agency or official" if the federal official furnishes guidance and reviews the statement before adopting it and if the State agency is of statewide jurisdiction.[2]

Both the district court and the court of appeals concluded that the Federal Highway Administration had furnished guidance to the Vermont Highway Department (an agency of statewide jurisdiction), had participated in the preparation of the statement, and had reviewed and evaluated the statement prior to adopting it as a federal document. Accordingly, Congress has in effect overruled the court of appeals' holding that NEPA does not allow preparation of the impact statement by a State agency.[3] If this were the only issue in the case, it would be appropriate for this Court to vacate the judgment of the court of appeals and remand for further consideration in light of Pub. L. 94-83.

[2]The Conference Report (H.R. Conf. Rep. No. 94-388, 94th Cong., 1st Sess. (1975)) and other legislative history of the Act (see, *e.g.*, 121 Cong. Rec. H7739-H7750 (daily ed. July 29, 1975)) indicate that the primary purpose of the Act was to overturn the result in the instant case and in *Swain* v. *Brinegar*, C.A. 7 (reprinted at Pet. App. 83a-115a). Congress believed that this case and *Swain* were inconsistent with NEPA, and acted quickly to correct any misimpression the two cases may have created. The Act does not provide that all impact statements *must* meet these criteria, but only that, if they do, their authorship does not make them defective. Other statements (for example, statements prepared by agencies of less than statewide jurisdiction) are adequate if they meet the standards articulated in cases such as *Fayetteville Area Chamber of Commerce* v. *Volpe*, 515 F.2d 1021 (C.A. 4), petition for certiorari pending *sub nom. Interstate 95 Committee* v. *Coleman*, No. 75-180; *Friends of the Earth* v. *Coleman*, 513 F.2d 295 (C.A. 9); and the cases we have noted at Pet. 14.

[3]Section 102(2)(D)(iv) of NEPA, as added by Pub. L. 94-83, provides that interstate impacts shall be evaluated independently by the responsible federal agency. This subsection does not become effective until after January 1, 1976, however, and even then requires an independent evaluation only if a "[s]tate or * * * Federal land management entity" disagrees with the assessment in the State-prepared impact statement.

2. Pub. L. 94-83 does not affect the second issue presented by our petition—whether a separate impact statement must be prepared on 280 miles of four-lane highway, not yet proposed to or by any federal official, as a precondition to building 20 miles of two-lane highway. We submit that this question is now appropriate for summary decision in light of this Court's intervening decision in *Aberdeen & Rockfish R.R.* v. *SCRAP*, No. 73-1966, decided June 24, 1975 (*SCRAP II*).

The district court held, and the court of appeals agreed, that a separate impact statement on the effects of constructing a superhighway through the 280-mile "Route 7 corridor"' must be prepared because planners in three states hope, one day, to construct a superhighway through that corridor. But under NEPA "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action." *SCRAP II, supra*, slip op. at 26; emphasis in original. Neither the district court nor the court of appeals found that any agency had made a "proposal" to construct a superhighway through the Route 7 corridor; nor has any agency, state or federal, made any recommendation or report on such a proposal.

Even if the desires of highway officials could be analogized to a "proposal" for NEPA purposes, the party that must make the recommendation or report is the federal agency, and the Federal Highway Administration has not yet either received or considered (let alone adopted, recommended or reported on) any proposal with respect to the entire Route 7 corridor. Even in the light most favorable to the Conservation Society, the findings of the courts below establish no more than that some state and federal employees have hoped that, in the future, their agencies will consider proposing further construction in the Route 7 corridor; no agency has proposed such con-

struction.[4] It follows directly that no impact statement was required and that the judgment of the court of appeals should be reversed. See Pet. 21-22.

Reversal at this time will substantially clarify the important question of the scope of the impact statement, a question relevant to every environmental case and one that will recur until settled by this Court. However, if the Court decides that summary reversal on this question is inappropriate, we request it to vacate the entire judgment of the court of appeals and remand with instructions to consider the effects of both Pub. L. 94-83 and *SCRAP II* on this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[4]This would be a different case if the courts below had required simply more extensive consideration of the effects (including the effects on the Route 7 corridor) of building the 20-mile segment. They did not do so, however; they required a separate statement concerning the effects of building 280 miles of highway.

APPENDIX

Pub. L. 94-83 provides:

That section 102(2) of the National Environmental Policy Act of 1969 (83 Stat. 852) is amended by redesignating subparagraphs (D), (E), (F), (G), and (H) as subparagraphs (E), (F), (G), (H), and (I), respectively; and by adding immediately after subparagraph (C) the following new subparagraph:

> "(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
>
> "(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
>
> "(ii) the responsible Federal official furnishes guidance and participates in such preparation,
>
> "(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
>
> "(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.
>
> The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction."